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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1935

No. 227

COLLIER SERVICE CORPORATION, FORMERLY BROADWAY SUBWAY ADVERTISING CO., INC., PETITIONER,

vs.

COMMISSIONER OF INTERNAL REVENUE.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITION FOR CERTIORARI FILED JULY 8, 1935.

CERTIORARI GRANTED OCTOBER 14, 1935.

SUPREME COURT OF THE UNITED STATES

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—7116-C

[fol. 1]

BEFORE UNITED STATES BOARD OF TAX APPEALS

Docket No. 51372

COLLIER SERVICE CORPORATION, Formerly BROADWAY SUBWAY ADVERTISING CO., INC.,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent

DOCKET ENTRIES

APPEARANCES:

For Petitioner: Laurence Graves, Esq., A. M. Kracke, Esq.

For Respondent: W. F. Gibbs, Esq.

Transferred to Mr. Murdock.

1930.

Dec. 17. Petition received and filed. Taxpayer notified. Fee paid.

" 17. Copy of petition served on General Counsel.

1931.

Feb. 10. Answer filed by General Counsel.

" 17. Copy served—assigned General Calendar.

1932.

Oct. 5. Hearing set November 15, 1932.

" 22. Motion for 60 days continuance filed by taxpayer. October 25, 1932 granted to January 16, 1933.

[fol. 2]

1933.

Jan. 16. Hearing had before Mr. C. R. Arundell, Division 7. Submitted on the merits. On petitioner's motion, consolidated with dockets 51,341 to 51,380, except 51,362 and 51,371. Oral amendment made to petition. Stipulation of facts filed. Briefs due March 15, 1933.

" 23—Transcript of hearing January 16, 1933 filed.

Nov. 23—Opinion rendered—J. E. Murdock, Division 3. Decision will be entered under Rule 50.

DOCKET ENTRIES—Continued

1934

Mar. 15—Stipulation as to deficiency filed.
" 20—Decision entered—Division 3.
June 1—Motion to fix amount of bond filed by taxpayer.
" 2—Order fixing amount of bond at $79,000 entered.
" 20—Petition for review by United States Circuit Court of Appeals, Second Circuit, with assignments of error filed by taxpayer.
" 20—Proof of service filed by taxpayer.
Aug. 7—Præcipe with proof of service thereon filed.
" 18—Order extending time for transmission and delivery of record to September 10, 1934 entered.

[fol. 3] BEFORE UNITED STATES BOARD OF TAX APPEALS

[Title omitted]

PETITION—Filed Dec. 17, 1930

The above-named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency IT:AR:A-5-HGF-60D, dated October 21, 1930, and as a basis for this proceeding alleges as follows:

1. The petitioner is a corporation with principal office at 220 West 42nd Street, New York, New York, organized under the laws of New York in May, 1915, with the name Broadway Subway and Home Borough Car Advertising Co., Inc., whose name was changed in March, 1924, to Broadway Subway Advertising Co., Inc., and again changed in October, 1928, to Collier Service Corporation.

2. The notice of deficiency (a copy of which is attached hereto and marked Exhibit A) was mailed to the petitioner on October 21, 1930.

3. The taxes in controversy are income taxes for the calendar years 1925 and 1926 and in the respective amounts of $7,109.71 and $42,497.21.

[fol. 4] 4. The determination of tax set forth in the said notice of deficiency is based upon the following errors:

(a) In the determination of the net income of Artemas Ward, Inc., a New York corporation, for the year 1925 as well as the consolidated net income, the total tax of the consolidated group and the proportion of such tax to be assessed upon the petitioner, the respondent has failed and refused to allow a deduction for the exhaustion of the March 1, 1913, fair market value or of the cost of a contract with the Interborough Rapid Transit Company in an amount not less than $63,749.40.

(b) In the determination of the net income of Artemas Ward, Inc., a New York corporation, for the year 1925 as well as the consolidated net income, the total tax of the consolidated group and the proportion of such tax to be assessed upon the petitioner, the respondent has failed and refused to allow a deduction for a loss sustained by reason of the cancellation of the contract with the Interborough Rapid Transit Company in an amount not less than $605,619.30, representing the unexhausted portion of the March 1, 1913, fair market value or of the cost of said contract.

(c) In the determination of the net income of United Brokerage Company, a Delaware corporation, for the year 1926 as well as the consolidated net income, the total tax of the consolidated group and the proportion of such tax [fol. 5] to be assessed upon the petitioner, the respondent has failed and refused to allow a deduction for losses sustained by reason of sales of the capital stock of Artemas Ward, Inc., a New York corporation, in the aggregate amount of $3,062,314.54. The aggregate amount allowed by the respondent on account of these losses is $495,696.76.

(d) In the determination of the net income for the year 1925 of the corporations hereinafter listed in this assignment of error, the respondent has failed and refused to allow deductions on account of the net losses of such corporations for the years 1923 and/or 1924, said net losses having been computed in the amounts set opposite their respective names, and the respondent has also erred in the determination of the consolidated net income, the total tax of the consolidated group, and the proportion of such tax to be assessed upon the petitioner, by reason of his failure to allow deductions on account of such net losses.

Name	Year 1923	Year 1924
United Brokerage Company (Del.)	$ ——	$207,799.89
Street Railways Advertising Company (Del.)	——	11,577.84
Street Railways Advertising Company (N. Y.)	55,190.96	27,660.81
Broadway Subway Advertising Co., Inc		175,003.34
Mark D. Batchelder Company	5,495.80	——
(Motor Coach Advertising Service, Inc. (Md.)		11,934.84
*(Bus Advertising Service, Inc. (Md.)	13,220.83	
(Motor Coach Advertising Service, Inc. (N. Y.)		
[fol. 6]		
*(Bus Advertising Service, Inc. (N. Y.)	7,102.65	7,193.09
A. H. Armstrong Company	——	867.42
Iroquois Advertising Company	1,521.96	——
Transit Sales Corporation	13,405.53	3,146.12
Standard Vending Corporation	5,881.28	8,849.-5
*(Advertising Samplers, Inc		
(National Vending Service, Inc	26,149.75	17,342.84
Interstate Sales Company	5,508.19	2,721.13
De Soto Paint Manufacturing Company	33,199.51	2,223.22
Quincy Warehouse Company	16,254.12	9,324.34
*(The Florida Railroad and Navigation Corporation.	58,800.58	304,425.11
(Florida Hotel and Navigation Company		
Florida Gulf Coast Hotels, Inc	32,126.03	42,396.78
Alexander, Ramsey & Kerr, Inc	——	2,029.79
(Island Realty Company		2,755.5–
*(Island Investment Company	650.33	
Deep Lake Company	216,553.75	38,469.57
(Neighborhood Stores Display Service, Inc		
*(Manufacturers Display Service Corp	10,429.84	6,843.29
Universal Vending Service Company	53,711.58	43,392.89
Luna Amusement Company	263,118.48	——
Crazy Village Amusement Corporation	5,894.32	——
Harum Scarum Amusement Corporation	17,406.03	——
Lee County Land Company	1,710.37	7,117.19
Gulf Coast Realties Corporation	207.81	——
Florida Timber Lands Corporation	687.32	4,321.32
The Barfield Company	2,489.84	——
Florida Development Company		26,117.20
Inter County Telephone & Telegraph Company		7,615.04

* Change of name.

[fol. 7] (e) In the determination of the net income for the year 1926 of the corporations hereinafter listed in this assignment of error, the respondent has failed and refused to allow deductions on account of the net losses of such corporations for the years 1924 and/or 1925, said net losses having been computed in the amounts set opposite their respective names, and the respondent has also erred in the determination of the consolidated net income, the total tax of the consolidated group, and the proportion of such tax to be assessed upon the petitioner, by reason of his failure to allow deductions on account of such net losses.

Name	Year 1924	Year 1925
United Brokerage Company (Del.)	$207,799.89	$237,982.09
Street Railways Advertising Company (N. Y.)	27,660.81	14,925.62
Broadway Subway Advertising Co., Inc	175,003.34	——
Mark D. Batchelder Company	——	1,294.66
Motor Coah Advertising Service, Inc. (Md.)	11,934.84	37,752.08
(Motor Coach Advertising Service, Inc. (N. Y.)		12.15
*(Bus Advertising Service, Inc. (N. Y.)	7,193.09	
A. H. Armstrong Company	867.42	1,415.64
Iroquois Advertising Company	——	1,294.30
Transit Sales Corporation	3,146.12	2,405.25
Standard Vending Corporation	8,849.95	8,369.19
(Advertising Samplers, Inc		25,195.03
*(National Vending Service, Inc	17,342.84	
Interstate Sales Company	2,721.13	1,922.11
Bus Advertising Service, Inc. (Del.)	——	280.83
Quincy Warehouse Company	9,324.34	3,499.48
[fol. 8]		
The Florida Railroad and Navigation Corporation	304,425.11	278,038.98
Florida Gulf Coast Hotels, Inc	42,396.78	54,536.64
Island Realty Company	2,755.56	570.29
Deep Lake Company	38,469.57	21,397.04
Advertising Service Corporation	——	32.—
(Neighborhood Stores Display Service, Inc		6,330.38
*(Manufacturers Display Service Corp	6,843.29	
Northwestern Advertising Company, Inc	——	31,783.35
Universal Vending Service Company	43,392.89	38,216.45
Crazy Village Amusement Corporation	——	7,580.15
Witching Waves Company	——	4,151.49
Harum Scarum Amusement Corporation	——	1,012.96
Lee County Land Company	7,117.19	74,069.56
Gulf Coast Realties Corporation	——	20,932.37
Florida Timber Lands Corporation	4,321.32	78,417.58
The Barfield Company	——	8,864.38
Florida Development Company	26,117.20	21,031.34
John Weiss, Inc., Photographers	——	118.31
Inter County Telephone & Telegraph Company	7,615.04	23,824.79
Everglades Publishing Company	——	2,433.34
Times Square Utilities Company, Inc	——	1,838.57

* Change of name,

(f) In the determination of the net income for the years 1925 and 1926 of the corporations hereinafter listed in this assignment of error, the respondent has failed to allow deductions on account of franchise taxes accrued within such years under the taxing statutes of the State of New York in the amounts set opposite their respective names and the respondent has likewise erred in the determination of the consolidated net income, the total tax of the consolidated [fol. 9] group, and the proportion of such tax to be assessed upon the petitioner, by reason of his failure to allow deductions on account of such franchise taxes.

Name	Year 1925	Year 1926
Barron G. Collier, Inc. (N. Y.)	$47,332.38	$2,803.22
Street Railways Advertising Company (N. Y.)	15.00	15.00
Empire State Advertising Company	155.93	25.00
Motor Coach Advertising Service, Inc.	10.00	10.00
Parker, Griesar & Savel, Inc.	10.00	56.25
Pacific Railways Advertising Company	10.00	10.00
Manhattan General Equipment Co.	500.00	500.00
The Tabard Press	4,220.87	4,204.26
Luna Amusement Company	3,408.53	4,196.03
Crazy Village Amusement Corporation	100.67	10.00
American Ammone Company	1,680.12	1,680.53

5. The facts upon which the petitioner relies as a basis of this proceeding are as follows:

(a) The petitioner during the years 1925 and 1926 was one of a group of corporations, affiliated within the meaning of the provisions of Section 240 of the Revenue Act of 1926 with the corporations hereinafter listed, the gross income and deductions of which were reported in a consolidated return for each of said years, filed by United Brokerage Company, a Delaware corporation, as provided by said section.

Name

United Brokerage Company (Del.)
Street Railways Advertising Company (Del.)
The Stearn Advertising Company of New York
[fol. 10] Barron G. Collier Inc. (N. Y.)
Barron G. Collier, Incorporated, of Texas
Street Railways Advertising Company (N. Y.)
Broadway Subway Advertising Co., Inc.
Empire State Advertising Company
Middle States Publicity Company, Inc.
Mark D. Batchelder Company
Motor Coach Advertising Service, Inc. (Md.)
Motor Coach Advertising Service, Inc. (N. Y.)
Motor Coach Advertising Service, Inc. (Ill.)
A. H. Armstrong Company
Southern Advertising Agency, Inc.
East St. Louis Car Advertising Co., Inc.
Iroquois Advertising Company
Western Car Advertising Company
Transit Sales Corporation
Standard Vending Corporation
Advertising Samplers, Inc.

Interstate Sales Company
Bus Advertising Service, Inc. (Del.)
*Ridgways, Incorporated
De Soto Paint Manufacturing Company
Quincy Warehouse Company
Parker, Griesar & Savel, Inc.
The Florida Railroad and Navigation Corporation
Florida Gulf Coast Hotels, Inc.
Alexander, Ramsey & Kerr, Inc.
Island Realty Company
Deep Lake Company
[fol. 11] Automatic Machine Development Corporation
Advertisers Service Corporation
*Listerated Gum Corporation
**Artemas Ward, Inc. (Del.)
*Artemas Ward, Inc. (N. Y.)
Street Railways Advertising Company (N. J.)
Western Advertising Company
Barron G. Collier, Incorporated, of Delaware
Chicago Elevated Advertising Company
Neighborhood Stores Display Service, Inc.
Inland Advertising Agency
Northwestern Advertising Company, Inc.
Universal Vending Service Company
Pacific Railways Advertising Company
The Stearn Advertising Company (Ohio)
Manhattan General Equipment Co.
The Tabard Press
Luna Amusement Company
Crazy Village Amusement Corporation
Witching Waves Company
Helter Skelter Slide Corporation
Harum Scarum Amusement Corporation
Oceanview Realty Operating Company, Inc.
Lee County Land Company
Gulf Coast Realties Corporation
Florida Timber Lands Corporation
Manhattan Mercantile Corporation

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* Included in the consolidated return of the year 1925 only.

** Included in the consolidated return of the year 1926 only.

The Barfield Company
Island Investment Company
[fol. 12] Florida Development Company
Philadelphia Advertising Company
John Weiss, Inc., Photographers
Inter County Telephone & Telegraph Company
Everglades Publishing Company
American Ammone Company
Times Square Utilities Company, Inc.
United Stores Land & Improvement Company
**Caloosahatchee Tropical Company

(b) The respondent has determined that the corporations listed in paragraph 5 (a) above were affiliated within the meaning of the Revenue Act of 1926 for the years 1925 and/or 1926 and were permitted to file consolidated returns of net income for such years, and has determined the tax liability of the consolidated group upon the basis of consolidated returns and has determined the proportion of such tax which should be assessed upon the petitioner for such years.

(c) From the date of the opening of the first subway in the City of New York in 1903 and for some time subsequent to March 1, 1913, the advertising, vending and news selling privileges within the cars and stations of the subways and elevated railways of the Interborough Rapid Transit Company and affiliated companies were owned or controlled by [fol. 13] Artemas Ward and William Gow as equal partners in the firm of Ward & Gow, or by Artemas Ward, individually, doing business under the style and name of Ward & Gow. Prior to March 1, 1913, the said Artemas Ward acquired the interest of said William Gow in the partnership of Ward & Gow. In the acquisition of this one-half interest, the said Artemas Ward paid said Gow the sum of $1,665,910.92 for Gow's interest in said contract with the Interborough Rapid Transit Company. The contract in existence on March 1, 1913, with the Interborough Rapid Transit was by its terms to continue in existence until December 31, 1918. Early in the year 1913 negotiations were entered into between said Artemas Ward and the Interborough Rapid

** Included in the consolidated return of the year 1926 only.

Transit Company for the purpose of obtaining an extension or continuance of the privileges existing under the contract for a period of ten years, or to December 31, 1928. For and in consideration of the agreement on the part of said Artemas Ward to pay during the years 1914 to 1918, inclusive, the sum of $1,150,000 more than was called for under the terms of the contract in existence at March 1, 1913, as well as the agreement of said Artemas Ward to pay certain specified rentals for the period from January 1, 1919 to December 31, 1928, the Interborough Rapid Transit Company agreed by an instrument dated December 27, 1913, to an extension or continuance of the privileges and obligations of said contract to December 31, 1928.

[fol. 14] (d) The fair market value of said contract on March 1, 1913, was not less than $3,028,096.42. In the final determination of the Federal income tax liability of said Artemas Ward for the years 1913 to 1920, inclusive, the respondent has determined that said contract had a March 1, 1913, fair market value of $3,028,096.42 and has allowed deductions in the computation of the net income of said Artemas Ward for each of such years on account of the exhaustion of such contract based upon such value.

(e) On March 13, 1922, the assets of said Artemas Ward, used in the conduct of his advertising, vending and news selling business, including the said contract with the Interborough Rapid Transit Company, were transferred to Artemas Ward, Inc., a New York corporation, in exchange for the stock of said corporation.

(f) On June 30, 1925, the issued and outstanding capital stock of said Artemas Ward, Inc., was acquired by United Brokerage Company, a Delaware corporation, one of the group of corporations listed in paragraph 5 (a) above.

(g) The contract between said Artemas Ward, Inc., and the Interborough Rapid Transit Company was terminated November 1, 1925, by the Transit Commission of the State of New York.

(h) In the determination of the net income of said Artemas Ward, Inc., for the period from July 1, 1925 to [fol. 15] December 31, 1925, the respondent has failed to allow a deduction on account of the exhaustion of the March 1, 1913, fair market value or of the cost of said contract for

the months of July, August, September and October prior to its cancellation on November 1, 1925. The respondent has also failed to allow a deduction on account of the loss sustained by said Artemas Ward, Inc., resulting from the cancellation of said contract on November 1, 1925, of not less than $605,619.30, the unexhausted portion of the March 1, 1913, fair market value or of the cost thereof.

(i) As hereinbefore stated United Brokerage Company, a Delaware corporation, acquired the issued and outstanding capital stock of Artemas Ward, Inc., a New York corporation, on June 30, 1925. The cost of this stock was $3,414,345.63, representing the cash consideration agreed to be paid. On December 31, 1925, the net book value of the assets of said Artemas Ward, Inc., was the sum of $1,246,920.07. On December 31, 1925, pursuant to a plan of reorganization the said Artemas Ward, Inc., transferred all of its assets, subject to liabilities, with the exception of cash and accounts receivable aggregating $284,967.21, to Artemas Ward, Inc., a corporation organized under the laws of the State of Delaware, in exchange for 100 shares of the no par value common stock of that corporation. Immediately after this transfer and on December 31, 1925, Artemas Ward, Inc., a New York corporation, distributed [fol. 16] to its sole stockholder, United Brokerage Company, a Delaware corporation, the 100 shares of the capital stock of Artemas Ward, Inc., a Delaware corporation, and accounts receivable aggregating $234,967.21.

(j) On December 15, 1926, United Brokerage Company, a Delaware corporation, sold 497 shares of the no par common stock of Artemas Ward, Inc., a New York corporation, to George B. Anderson, an individual, for $4,970. Thereafter and on December 24, 1926, said United Brokerage Company sold to said Anderson for $44,670, all the remaining outstanding stock of Artemas Ward, Inc., a New York corporation, consisting of 4,467 shares. The resulting losses from these two transactions were, respectively, $306,601.60 and $2,755,712.94, a total of $3,062,314.54 and have not been allowed as deductions in computing the net income of said United Brokerage Company for the year 1926. The aggregate amount allowed by the respondent on account of these losses is $495,696.76.

(k) During the years 1923 and/or 1924 the corporations hereinafter listed in this paragraph, which have been determined by the respondent to have been affiliated with the petitioner for the year 1925, sustained net losses in respect of which the respondent has failed and refused to allow deductions for the year 1925 in computing the net income of such corporations, the consolidated net income, the total tax of the consolidated group, and the proportion [fol. 17] of such tax to be assessed upon the petitioner. The amount of the net loss of each such corporation for each year is that set opposite the name of the respective corporations.

Name	Year 1923	Year 1924
United Brokerage Company (Del.)	$ ——	$207,799.89
Street Railways Advertising Company (Del.)	——	11,577.84
Street Railways Advertising Company (N. Y.)	55,190.96	27,660.81
Broadway Subway Advertising Co., Inc		175,003.34
Mark D. Batchelder Company	5,495.80	——
*(Motor Coach Advertising Service, Inc. (Md.)		11,934.84
(Bus Advertising Service, Inc. (Md.)	13,220.83	
*(Motor Coach Advertising Service, Inc. (N. Y.)		
(Bus Advertising Service, Inc. (N. Y.)	7,102.65	7,193.09
A. H. Armstrong Company	——	867.42
Iroquois Advertising Company	1,521.96	——
Transit Sales Corporation	13,405.53	3,146.12
Standard Vending Corporation	5,881.28	8,849.95
*(Advertising Samplers, Inc		
(National Vending Service, Inc	26,149.75	17,342.84
Interstate Sales Company	5,508.19	2,721.13
De Soto Paint Manufacturing Company	33,199.51	2,223.22
Quincy Warehouse Company	16,254.12	9,324.34
*(The Florida Railroad and Navigation Corporation	58,800.58	304,425.11
(Florida Hotel and Navigation Company		
Florida Gulf Coast Hotels, Inc	32,126.03	42,396.78
Alexander, Ramsey & Kerr, Inc	——	2,029.79
*(Island Realty Company		2,755.56
(Island Investment Company	650.33	
Deep Lake Company	216,553.75	38,469.57
*(Neighborhood Stores Display Service, Inc		
(Manufacturers Display Service Corp	10,429.84	6,843.29
[fol. 18]		
Universal Vending Service Company	53,711.58	43,392.89
Luna Amusement Company	263,118.48	——
Crazy Village Amusement Corporation	5,894.32	——
Harum Scarum Amusement Corporation	17,406.03	——
Lee County Land Company	1,710.37	7,117.19
Gulf Coast Realties Corporation	207.81	——
Florida Timber Lands Corporation	687.32	4,321.32
The Barfield Company	2,489.84	——
Florida Development Company		26,117.20
Inter County Telephone & Telegraph Company		7,615.04

* Change of name.

(l) All corporations of the affiliated group listed in paragraph (k) above which had losses and net losses for the year 1823 also had losses and net losses for the year 1924 except those listed hereunder in this paragraph, which had net income (computed without deduction for net losses of the year 1923) in the amounts set opposite the names of the respective corporations.

Name	1924 Net Income Computed without Deduction for 1923 Net Loss
Mark D. Batchelder Company	$276.76
Iroquois Advertising Company	795.57
Luna Amusement Company	75,745.14
Crazy Village Amusement Corporation	2,236.80
Harum Scarum Amusement Corporation	8,183.93
Gulf Coast Realties Corporation	17.56
The Barfield Company	601.64

(m) During the years 1924 and/or 1925 the corporations [fol. 19] hereinafter listed in this paragraph, which have been determined by the respondent to have been affiliated with the petitioner for the year 1926, sustained net losses in respect of which the respondent has failed and refused to allow deductions for the year 1926 in computing the net income of such corporations, the consolidated net income, the total tax of the consolidated group, and the proportion of such tax to be assessed upon the petitioner. The amount of the net loss of each such corporation for each year is that set opposite the name of the respective corporations.

Name	Year 1924	Year 1925
United Brokerage Company (Del.)	$207,799.89	$237,982.09
Street Railways Advertising Company (N. Y.)	27,660.81	14,925.62
Broadway Subway Advertising Co., Inc	175,003.34	——
Mark D. Batchelder Company	——	1,294.66
Motor Coach Advertising Service, Inc. (Md.)	11,934.84	37,752.08
(Motor Coach Advertising Service, Inc. (N. Y.)		12.15
*(Bus Advertising Service, Inc. (MD.)	7,193.09	
A. H. Armstrong Company	867.42	1,415.64
Iroquois Advertising Company	——	1,294.30
Transit Sales Corporation	3,146.12	2,405.25
Standard Vending Corporation	8,849.95	8,369.19
*(Advertising Samplers, Inc		25,195.03
(National Vending Service, Inc.	17,342.84	
Interstate Sales Company	2,721.13	1,922.11
Bus Advertising Service, Inc. (Del.)	——	280.83
Quincy Warehouse Company	9,324.34	3,499.48
The Florida Railroad and Navigation Corporation	304,425.11	278,038.98

[fol. 20]

Name	Year 1924	Year 1925
Florida Gulf Coast Hotels, Inc	42,396.78	54,536.64
Island Realty Company	2,755.56	570.29
Deep Lake Company	38,469.57	21,397.04
Advertisers Service Corporation	—	32.87
*(Neighborhood Stores Display Service, Inc		6,330.38
(Manufacturers Display Service Corp	6,843.29	
Northwestern Advertising Company, Inc	—	31,783.35
Universal Vending Service Company	43,392.89	38,216.45
Crazy Village Amusement Corporation	—	7,580.15
Witching Waves Company	—	4,151.49
Harum Scarum Amusement Corporation	—	1,012.96
Lee County Land Company	7,117.19	74,069.56
Gulf Coast Realties Corporation	—	20,932.37
Florida Timber Lands Corporation	4,321.32	78,417.58
The Barfield Company	—	8,864.38
Florida Development Company	26,117.20	21,031.34
John Weiss, Inc., Photographers	—	118.31
Inter County Telephone & Telegraph Company	7,615.04	23,824.79
Everglades Publishing Company	—	2,433.34
Times Square Utilities Company, Inc	—	1,838.57

* Change of name.

(n) All corporations of the affiliated group listed in paragraph (m) above which had losses and net losses for the year 1924 also had losses and net losses for the year 1925 except Broadway Subway Advertising Company which in the year 1925 had net income (computed without deduction for net loss of the year 1924) of $138,451.18.

(o) During the years 1925 and 1926 the corporations [fol. 21] hereinafter listed in this paragraph became liable under the statutes of the State of New York for franchise taxes which have been assessed in the amounts set opposite their respective names and which the respondent has failed to allow as deductions in computing the net income of such corporations, as well as the consolidated net income, the total tax of the consolidated group, and the proportion of such tax to be assessed upon the petitioner.

Name	Year 1925	Year 1926
Barron G. Collier, Inc. (N. Y.)	$47,332.38	$2,803.22
Street Railways Advertising Company (N. Y.)	15.00	15.00
Empire State Advertising Company	155.93	25.00
Motor Coach Advertising Service, Inc	10.00	10.00
Parker, Griesar & Savel, Inc	10.00	56.25
Pacific Railways Advertising Company	10.00	10.00
Manhattan General Equipment Co	500.00	500.00
The Tabard Press	4,220.87	4,204.26
Luna Amusement Company	3,408.53	4,196.03
Crazy Village Amusement Corporation	100.67	10.00
American Ammone Company	1,680.12	1,680.53

Wherefore, the petitioner prays that the Board may hear this proceeding and find and determine as follows:

(a) That Artemas Ward, Inc., a New York corporation, is entitled to a deduction in computing net income for the year 1925 for the exhaustion of the March 1, 1913, fair market value or of the cost of a contract with the Interborough Rapid Transit Company, of not less than $63,749.40.

(b) That Artemas Ward, Inc., a New York corporation, [fol. 22] is entitled to a deduction in computing net income for the year 1925, for a loss sustained by reason of the cancellation of the contract with the Interborough Rapid Transit Company on November 1, 1925, of not less than $605,619.30.

(c) That United Brokerage Company, a Delaware Corporation, is entitled to deductions in computing net income for the year 1926, for losses sustained on sales of the capital stock of Artemas Ward, Inc., a New York corporation, in the aggregate amount of $3,062,314.54 instead of the aggregate amount of $495,696.76, allowed by the respondent.

(d) That in computing net income for the year 1925 of the corporations listed in paragraph 5 (k), deductions be allowed on account of the net losses of such corporations for the years 1923 and/or 1924 as required by the provisions of Section 206 of the Revenue Act of 1926.

(e) That in computing net income for the year 1926 of the corporations listed in paragraph 5 (m), deductions be allowed on account of the net losses of such corporations for the years 1924 and/or 1925 as required by the provisions of Section 206 of the Revenue Act of 1926.

(f) That in computing net income for the years 1925 and 1926 of the corporations listed in paragraph 5 (o), deductions be allowed for New York State franchise taxes accrued during such years in the amounts shown in said paragraph 5 (o).

[fol. 23] (g) Such other and further relief to which the petitioner may be entitled under the Revenue Act of 1926.

(Sgd.) Laurence Graves, Murphy, Lanier and Quinn, 618 Southern Building, Washington, D. C. Of Counsel: G. A. O'Donohue, Murphy, Lanier and Quinn, 522 Fifth Avenue, New York, N. Y. A. M. Kracke, Davis & Kracke, The Rookery, Chicago, Ill., Attorneys for Petitioner.

Duly sworn to by W. A. Buckner. Jurat omitted in printing.

[fol. 24] EXHIBIT "A" TO PETITION

Copy

NP-2-26.

Treasury Department, Washington

Office of Commissioner of Internal Revenue

Address reply to Commissioner of Internal Revenue and refer to Broadway Subway Advertising Company, c/o United Brokerage Company of Delaware, 220 West 42nd Street, New York, New York.

Oct. 21, 1930.

SIRS:

You are advised that the determination of your tax liability for the years 1925 and 1926 discloses a deficiency of $49,606.92, as shown in the statement attached.

In accordance with Section 274 of the Revenue Act of 1926, notice is hereby given of the deficiency mentioned. Within sixty days (not counting Sunday as the sixtieth day) from the date of the mailing of this letter, you may petition the United States Board of Tax Appeals for a redetermination of your tax liability.

However, if you do not desire to petition, you are requested to execute the enclosed agreement form and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:C:P-7. The signing of this agreement will expedite the closing of your returns [fol. 25] by permitting an early assessment of any deficiency and preventing the accumulation of interest charges, since the interest period terminates thirty days after filing the enclosed agreement, or on the date assessment is made, whichever is earlier; whereas if no agreement is filed, interest will accumulate to the date of assessment of the deficiency.

Respectfully, David Burnet, Commissioner, by J. C. Wilmer, Deputy Commissioner.

Enclosures: Statement, Form 882, Form 870.

IT:AR:A-5.
HGF-60D.

Statement of Returns Examined

and

Resulting Tax Liability

Returns Examined

Company.	Year.	Form.
Broadway Subway Advertising Company, c/o United Brokerage Company of Delaware, 220 West 42nd Street, New York, New York.	1925	*
	1926	*

[fol. 26]

Tax Liability

Year.	Corrected tax liability.	Tax previously assessed.	Deficiency.
1925	$7,109.71	None	$7,109.71
1926	42,497.21	None	42,497.21
Totals	$49,606.92	None	$49,606.92

Allocation of this tax to your company is in accordance with the provisions of Section 240 of the Revenue Act of 1926, and is fully explained in a separate communication addressed to the United Brokerage Company of Delaware.

Consents which will expire December 31, 1930, except as extended by the provisions of Section 277(b) of the Revenue Act of 1926, are on file for the years 1925 and 1926.

BEFORE UNITED STATES BOARD OF TAX APPEALS

[Title omitted]

ANSWER—Filed Feb. 10, 1931

The Commissioner of Internal Revenue, by his attorney, C. M. Charest, General Counsel, Bureau of Internal Revenue, for answer to the petition filed in the above-entitled appeal, admits and denies as follows:

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* The income has been reported in the consolidated returns filed by the United Brokerage Company of Delaware, Parent.

[fol. 27] 1, 2 and 3. Admits the allegations in paragraphs 1, 2 and 3.

4. Denies the notice of deficiency is based upon the errors alleged and set forth in paragraphs 4(a to f).

5(a). Admits the allegations contained in paragraph 5(a), except that it is denied that the petitioner was held by the respondent to be affiliated with Ridgways, Incorporated.

5(b). Admits the allegations contained in paragraph 5(b), except that it is denied that Ridgways, Incorporated, was affiliated with the consolidated group of which petitioner is a member.

5(c). Denies the allegations contained in paragraph 5(c).

5(d). Admits the allegations contained in paragraph 5(d), except that it is denied that the March 1, 1913, value of the contract in question was $3,028,096.42.

5(e) Admits the allegations in paragraph 5(e).

5(f) and 5(g). Denies the allegations in paragraphs 5(f) and 5(g).

5(h). Admits the allegations in paragraph 5(h).

5(i) to 5(o). Denies the allegations in paragraphs 5(i) to 5(o) inclusive.

Wherefore, it is prayed that the taxpayer's appeal be denied.

(Signed) C. M. Charest, General Counsel, Bureau of Internal Revenue. Of Counsel: W. Frank Gibbs, Special Atty., Bureau of Int. Revenue.

[fol. 28] BEFORE UNITED STATES BOARD OF TAX APPEALS

[Title omitted]

AMENDMENT TO PETITION

(Excerpt from Transcript of Hearing of Jan. 16, 1933)

Mr. Graves: With respect to the amount of tax—the amount of deduction on the loss of the contract, it seems

to me that is purely a matter of argument. We have claimed $604,000. I hate to amend all of these 35 petitions to make my claim for the larger amount——

Mr. Gibbs: That brings up a question—I have no objection to the procedure, which I think is practiced in presenting cases to the Board, that the pleadings may be considered to conform to the proof which we are now submitting, and if that is agreeable, I have no objection to that procedure.

The Member: If we reach a conclusion that a higher value than $605,000 should be allowed, we can consider that the petitions ask for the higher value?

Mr. Gibbs: Yes.

The Member: Very well.

[fol. 29] BEFORE UNITED STATES BOARD OF TAX APPEALS

[Title omitted]

STIPULATION OF FACTS—Filed Jan. 16, 1933

It is hereby agreed and stipulated by and between the parties to this proceeding through their respective attorneys that the following facts are true, without prejudice to the rights of either party to present further or additional evidence:

1. The petitioner is one of a group of thirty-four affiliated corporations having appeals pending before this Board involving the taxable years 1925 and/or 1926. The names of such corporations and the docket numbers of their respective appeals are as follows:

Name.	Docket No.
Southern Advertising Agency, Inc.	51346
Neighborhood Stores Display Service, Inc.	51347
Artemas Ward, Inc.	51348
Luna Amusement Company	51349
Harum Scarum Amusement Corporation	51350
The Stearn Advertising Company	51351
[fol. 30] Motor Coach Advertising Service, Inc.	51352
Philadelphia Advertising Company	51353
Bluff City Paint Company (formerly DeSoto Paint Manufacturing Company)	51354

Name.	Docket No.
Parker, Griesar & Savel, Inc.	51355
Inland Advertising Agency	51356
Western Advertising Company	51357
Collier Advertising Service, Inc. (formerly Artemas Ward, Inc.)	51358
Barron G. Collier, Incorporated, of Texas	51359
Iroquois Advertising Company	51360
Helter Skelter Slide Corporation	51361
Chicago Elevated Advertising Company	51363
The Tabard Press	51364
Empire State Advertising Company	51365
Oceanview Realty Operating Company, Inc.	51366
The Stearn Advertising Company of New York	51367
Barron G. Collier, Inc.	51368
A. H. Armstrong Company	51369
Mark D. Batchelder Company	51370
Collier Service Corporation (formerly Broadway Subway Advertising Co., Inc.)	51372
Alexander, Ramsey & Kerr, Inc.	51373
Middle States Publicity Company, Inc.	51374
American Ammone Company	51375
Pacific Railways Advertising Company	51376
Street Railways Advertising Company	51377
Manhattan Mercantile Corporation	51378
United Stores Land & Improvement Company	51379
Island Investment Company	51380

2. This stipulation of facts shall serve as a stipulation of [fol. 31] the facts in each of the proceedings listed in the preceding paragraph, which have been or will be consolidated for hearing and decision with this proceeding.

3. The petitioner during the years 1925 and 1926 was one of a group of corporations affiliated, within the meaning of the provisions of Section 240 of the Revenue Act of 1926, with the following corporations, the gross income and deductions of which were reported in a consolidated return for each of said years, filed by United Brokerage Company, a Delaware corporation, as provided in said section:

United Brokerage Company (Del.).
Street Railways Advertising Company (Del.).
The Stearn Advertising Company of New York.
Barron G. Collier, Inc. (N. Y.).

Barron G. Collier, Incorporated, of Texas.
Street Railways Advertising Company (N. Y.).
Broadway Subway Advertising Co., Inc.
Empire State Advertising Company.
Middle States Publicity Company, Inc.
Mark D. Batchelder Company.
Motor Coach Advertising Service, Inc. (Md.).
Motor Coach Advertising Service, Inc. (N. Y.).
Motor Coach Advertising Service, Inc. (Ill.).
A. H. Armstrong Company.
Southern Advertising Agency, Inc.
East St. Louis Car Advertising Co., Inc.
Iroquois Advertising Company.
Western Car Advertising Company.
Transit Sales Corporation.
[fol. 32] Standard Vending Corporation.
Advertising Samplers, Inc.
Interstate Sales Company.
Bus Advertising Service Inc. (Del.).
De Soto Paint Manufacturing Company.
Quincy Warehouse Company.
Parker, Griesar & Savel, Inc.
The Florida Railroad and Navigation Corporation.
Florida Gulf Coast Hotels, Inc.
Alexander, Ramsey & Kerr, Inc.
Island Realty Company.
Deep Lake Company.
Automatic Machine Development Corporation.
Advertisers Service Corporation.
* Listerated Gum Corporation.
** Artemas Ward, Inc. (Del.).
* Artemas Ward, Inc. (N. Y.).
Street Railways Advertising Company (N. J.)
Western Advertising Company.
Barron G. Collier, Incorporated, of Delaware.
Chicago Elevated Advertising Company.
Neighborhood Stores Display Service, Inc.
Inland Advertising Agency.
Northwestern Advertising Company, Inc.

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* Included in the consolidated return of the year 1925 only.

** Included in the consolidated return of the year 1926 only.

Universal Vending Service Company.
Pacific Railways Advertising Company.
The Stearn Advertising Company (Ohio).
Manhattan General Equipment Co.
The Tabard Press.
Luna Amusement Company.
[fol. 33] Crazy Village Amusement Corporation.
Witching Waves Company.
Helter Skelter Slide Corporation.
Harum Scarum Amusement Corporation.
Oceanview Realty Operating Company, Inc.
Lee County Land Company.
Gulf Coast Realties Corporation.
Florida Timber Lands Corporation.
Manhattan Mercantile Corporation.
The Barfield Company.
Island Investment Company.
Florida Development Company.
Philadelphia Advertising Company.
John Weiss, Inc., Photographers.
Inter County Telephone & Telegraph Company.
Everglades Publishing Company.
American Ammone Company.
Times Square Utilities Company, Inc.
United Stores Land & Improvement Company.
**Caloosahatchee Tropical Company.

4. The respondent has determined that the corporations listed in the preceding paragraph were affiliated within the meaning of the Revenue Act of 1926 for the years 1925 and/or 1926 and were permitted to file consolidated returns of net income for such years and has determined the tax liability of such corporations upon the basis of the consolidated returns filed by said United Brokerage Company for such corporations for such years and has determined the proportion of the tax found to be due upon such returns which should be assessed upon each of such corporations.

[fol. 34] 5. Artemas Ward, Inc. (N. Y.), which was affiliated with the petitioner from July 1, 1925 to December

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**Included in the consolidated return of the year 1926 only.

31, 1925, was organized as a corporation under the laws of the State of New York on or about December 30, 1921 and on March 13, 1922, acquired the assets employed by one Artemas Ward in his advertising vending and news selling business, in exchange for the issuance of its entire stock to said Artemas Ward. One of the assets so acquired was a contract with Interborough Rapid Transit Company, a corporation engaged in business in New York City, which granted to said Artemas Ward the advertising, vending and news selling privileges in the cars and stations of the subways and elevated railways of Interborough Rapid Transit Company and affiliated companies. This contract until December 31, 1928.

6. The fair market value of said contract on March 1, 1913, was $3,028,096.42. In the determination of the Federal income tax liability of said Artemas Ward for the years 1913 to 1920, inclusive, the respondent has allowed as deductions in computing net income the following amounts on account of the exhaustion of said March 1, 1913, value of said contract:

1913	$159,373.50
1914	191,248.20
1915	191,248.20
1916	191,248.20
1917	191,248.20
1918	191,248.20
1919	191,248.20
1920	191,248.20

[fol. 35] 7. The gross income and deductions from the advertising, vending and news selling business of said Artemas Ward for the year 1921 and for the period January 1, 1922 to March 13, 1922, were reported in Federal income tax returns filed by said Artemas Ward, Inc., under the provisions of Section 229 of the Revenue Act of 1921. In the determination of the Federal income tax liability of said Artemas Ward, Inc., for the years 1921, 1922, 1923, 1924 and for the period January 1, 1925 to June 30, 1925, the respondent has allowed the following deductions in

computing net income on account of the exhaustion of the value of said contract with Interborough Rapid Transit Company:

1921	$191,248.20
1922	766,642.59
1123	766,642.59
1924	191,248.20
Jan. 1 to June 30, 1925	95,624.10

8. The deduction allowable in the computation of the net income of said Artemas Ward, Inc., for the period January 1, 1922 to March 13, 1922, on account of the exhaustion of the March 1, 1913 value of said contract with Interborough Rapid Transit Company is $37,201.66. The deduction allowable in the computation of the net income of said Artemas Ward, Inc., for the period from March 14, 1922 to December 31, 1922, is the amount of $613,314.07, based upon a value for said contract at the time it was acquired by said Artemas Ward, Inc., in excess of the March 1, 1913 value thereof.

[fol. 36] 9. On June 30, 1925, the issued and outstanding capital stock of said Artemas Ward, Inc., consisting of 4,964 shares of no par value common stock, was acquired by said United Brokerage Company at a cost of $3,414,345.63.

10. The said contract with Interborough Rapid Transit Company was terminated November 1, 1925, by the Transit Commission of the State of New York.

11. In the determination of the net income of said Artemas Ward, Inc., for the period from July 1, 1925 to December 31, 1925, the respondent has failed to allow a deduction on account of the exhaustion of the March 1, 1913, fair market value of said contract with Interborough Rapid Transit Company for the months of July, August, September and October, prior to its cancellation on November 1, 1925. The deduction allowable for the exhaustion of said value for said months is $63,749.40.

12. In the consolidated return filed by said United Brokerage Company for the calendar year 1925 the gross income and deductions of said Artemas Ward, Inc., were reported for the period July 1 to December 31, 1925. A

deduction of $2,427,701.18 was claimed in said return by said Artemas Ward, Inc., as the amount of the loss sustained by it as the result of the cancellation of said contract with Interborough Rapid Transit Company on November 1, 1925.

13. In the determination of net income of said Artemas Ward, Inc., for the period from July 1, 1925 to December [fol. 37] 31, 1925, the respondent has determined that said Artemas Ward, Inc., sustained no deductible loss by reason of the termination of said contract with Interborough Rapid Transit Company.

14. On December 31, 1925, the fair value of the net assets of said Artemas Ward, Inc., was $1,246,920.07. On December 31, 1925, in pursuance of a plan of reorganization, said Artemas Ward, Inc., transfered all of its assets subject to liabilities with the exception of cash and accounts receivable, aggregating $284,967.21, to Artemas Ward, Inc., a corporation organized under the laws of the State of Delaware, in exchange for the issuance to it of 100 shares of the no par value common stock of that corporation, said 100 shares being all of the issued and outstanding capital stock at said time. Immediately after this transfer and on December 31, 1925, Artemas Ward, Inc., a New York corporation, distributed to its sole stockholder, said United Brokerage Company, in pursuance of said plan, said 100 shares of the capital stock of Artemas Ward, Inc., a Delaware corporation, and accounts receivable aggregating $234,967.21, without the surrender by said United Brokerage Company of any of the capital stock of said Artemas Ward, Inc., a New York corporation.

15. On December 15, 1926, said United Brokerage Company sold 497 shares of the no par value common stock of Artemas Ward, Inc., a New York corporation, for $4,970.00 to George B. Anderson, who had no connection with any of the corporations a party to these proceedings either as an officer, employee or stockholder. Thereafter and on [fol. 38] December 24, 1926, said United Brokerage Company sold to said George B. Anderson all of the remaining outstanding capital stock of said Artemas Ward, Inc., a New York corporation, consisting of 4,467 shares for $44,670.00.

16. In the consolidated return filed by said United Brokerage Company for itself and affiliated companies for the year 1925 a deduction of $3,062,314.54 was claimed by said United Brokerage Company as a loss resulting from said sales of the stock of Artemas Ward, Inc., a New York corporation, in December, 1926. The loss so claimed was computed in the following manner: The cost to said United Brokerage Company of the stock of Artemas Ward, Inc., a New York corporation, of $3,414,345.63 was apportioned between the 4,964 shares of the stock of said Artemas Ward, Inc., a New York corporation, and the 100 shares of the stock of said Artemas Ward, Inc., a Delaware corporation, in accordance with the provisions of Article 1599 of Regulations 69 in force and effect at the time of said transactions in December, 1926. In accordance with the apportionment so made, the portion of said cost allocated to said 100 shares of stock of Artemas Ward, Inc., a Delaware corporation, was $67,423.88 and the balance of said cost, namely, $3,346,921.75, was allocated to the 4,964 shares of the stock of Artemas Ward, Inc., a New York corporation.

17. The $3,346,921.75 so apportioned to the 4,964 shares of Artemas Ward, Inc., a New York corporation, was then reduced by $234,967.21, representing the value of the ac- [fol. 39] counts receivable distributed to said United Brokerage Company on December 31, 1925, by Artemas Ward, Inc., a New York corporation, as hereinbefore stated. The cost so apportioned to the 4,964 shares of stock of Artemas Ward, Inc., a New York corporation, was $3,111,954.54, to wit, $826,904621 per share, and when the 497 shares of said stock were sold on December 15, 1926, for $4,970.00 said United Brokerage Company computed its loss through said sale to be the sum of $306,601.60 and when the balance of said stock consisting of 4,467 shares was sold on December 24, 1926, said United Brokerage Company computed its loss through said sale to be $2,755,712.94, the aggregate of such losses being the amount of the $3,062,314.54 which was claimed as a deduction as hereinbefore stated.

18. In the determination of the deficiencies in tax for the year 1926 at issue in these proceedings the respondent has allowed as a deduction on account of the losses sustained by United Brokerage Company upon the sales of said stock

of Artemas Ward, Inc., a New York corporation, in December, 1926, the amount of $495,696.76. Said amount was computed by the respondent in accordance with Treasury Decision 4274, promulgated November 12, 1929, amending Article 1599 of Regulations 69, in the following manner:

Cost of stock of Artemas Ward, Inc. (N. Y.)			$3,414,345.63
Net worth Artemas Ward, Inc. (N. Y.) Dec. 31, 1925 (date of reorganization)			$ 284,967.21
Net worth Artemas Ward, Inc. (Del.) Dec. 31, 1925			961,952.86
Total			$1,246,920.07
[fol. 40]			
Ratio:			
To Artemas Ward, Inc. (N. Y.)			22.85369%
To Artemas Ward, Inc. (Del.)			77.14631%
Total			100.
Basis remaining after reorganization:			
Artemas Ward, Inc. (N. Y.) (3,414,345.63 x 22.85369%)			$ 780,303.97
Artemas Ward, Inc. (Del.) (3,414,345.63 x 77.14631%)			2,634,041.66
Total			$3,414,345.63
Basis Artemas Ward, Inc. (N. Y.)		$780,303.97	
Accounts Receivable and Cash	$284,967.21		
Cash Retained	50,000.00		
Distributed to United Brokerage Company of Delaware	$234,967.21	234,967.21	
Net basis		$545,336.76	
Selling prices—			
497 shares	$4,970.00		
4,467 shares	44,670.00		
		49,640.00	
Loss on sale		$495,696.76	

19. The corporations hereinafter listed in this paragraph are entitled to deductions for the years 1925 and 1926 on account of New York State franchise taxes, which have been assessed against them in the amounts set opposite their respective names, which amounts have not been allowed as deductions by the respondent in the determination of the deficiencies in tax at issue in these proceedings:

[fol. 41]

Name	Year 1925	Year 1926
Barron G. Collier, Inc. (N. Y.)	$47,332.38	$2,803.22
Street Railways Advertising Company (N. Y.)	15.00	15.00
Empire State Advertising Company	155.93	25.00
Motor Coach Advertising Service, Inc	10.00	10.00
Parker, Griesar & Savel, Inc	10.00	56.25
Pacific Railways Advertising Company	10.00	10.00
Manhattan General Equipment Co	500.00	500.00
The Tabard Press	4,220.87	4,204.26
Luna Amusement Company	3,408.53	4,196.03
Crazy Village Amusement Corporation	100.67	10.00
American Ammone Company	1,680.12	1,680.53

(S.) Laurence Graves, 618 Southern Building, Washington, D. C.; (S.) Arthur M. Kracke, The Rookery, Chicago, Illinois, Attorneys for Petitioner. (S.) C. M. Charest, General Counsel, Bureau of Internal Revenue, Attorney for Respondent.

[fol. 42] Before United States Board of Tax Appeals

Docket Nos. 51,345-51,361, 51,363-51,370, 51,372-51,380

Manhattan General Equipment Company et al.[1],
Petitioners,

v.

Commissioner of Internal Revenue, Respondent

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[1]Proceedings of the following petitioners are consolidated and decided herewith: Southern Advertising Agency, Inc.; Neighborhood Stores Display Service, Inc.; Artemas Ward, Inc.; Luna Amusement Co.; Harum Scarum Amusement Corporation; The Stearn Advertising Company; Motor Coach Advertising Service, Inc.; Philadelphia Advertising Company; Bluff City Paint Company (formerly DeSoto Paint Manufacturing Company); Parker, Griesar & Savel, Inc.; Inland Advertising Agency; Western Advertising Company; Collier Advertising Service, Inc. (formerly Artemas Ward, Inc.); Barron G. Collier, Inc., of Texas; Iroquois Advertising Co.; Helter Skelter Slide Corporation; Chicago Elevated Advertising Company; The Tabard Press; Empire State Advertising Company; Oceanview Realty Operating Company, Inc.; The Stearn Advertising Company of New York; Barron G. Collier, Inc.;

Promulgated November 23, 1933

1. A corporation acquired a contract from an individual in an exchange upon which no gain or loss was recognized under the Revenue Act of 1921, and, under the Revenue Act of 1926, the basis for determining gain or loss to the corporation was the same as it would be in the hands of [fol. 43] the transferor. Held, in determining gain or loss resulting from cancellation of the contract prior to the end of its term, the basis should be reduced, not only by the deductions for exhaustion of the contract allowable to the corporation, but also by those allowable to the transferor.

2. Where a stockholder receives shares of stock in another corporation, pursuant to a plan of reorganization, without surrender of its original shares, and thereafter sells the original shares, the gain or loss on the shares sold should be computed by allocating the basis of the shares originally held between those shares and the shares acquired in the reorganization, in proportion to the value of each stock at the date of reorganization, rather than in proportion to the number of shares of each stock held at that time. Bertha G. Bamberger, 27 B. T. A. 785, followed.

Laurence Graves, Esq., and A. M. Kracke, Esq., for the Petitioners.

W. Frank Gibbs, Esq., for the Respondent.

OPINION

MURDOCK:

The taxes in controversy are income taxes for the years 1925 and 1926. The proceedings have been consolidated. The parties filed a stipulation of facts in which the affiliated status of the various petitioners and other pertinent facts

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A. H. Armstrong Company; Mark D. Batchelder Company; Collier Service Corporation (formerly Broadway Subway Advertising Co., Inc.); Alexander, Ramsey & Kerr, Inc.; Middle States Publicity Company, Inc.; American Ammone Company; Pacific Railways Advertising Company; Street Railways Advertising Company; Manhattan Mercantile Corporation; United Stores Land & Improvement Company; Island Investment Company.

are shown. There was no testimony or other evidence except a copy of a notice of deficiency.

[fol. 44] The only issue in so far as the year 1925 is concerned, is whether or not the basis for gain or loss to Artemas Ward, Inc., a corporation of New York, upon the cancellation of a certain contract, should be reduced by deductions for depreciation or exhaustion of the contract allowable to Artemas Ward, an individual, during the period of his ownership of the contract. The contract in question was between the Interborough Rapid Transit Co., a corporation engaged in business in New York City, and Artemas Ward, an individual whereby the former granted to the latter exclusive advertising, vending, and news-selling privileges in the cars and stations of the Transit Co. and its affiliated companies. The contract provided that it should continue until December 31, 1928. It was acquired by Artemas Ward prior to March 1, 1913, and the parties have stipulated that its fair market value on March 1, 1913, was $3,028,096.42.

Artemas Ward, Inc., one of the petitioners herein, was organized under the laws of the State of New York on or about December 30, 1921. On March 13, 1922, Artemas Ward transferred the contract in question to his corporation in exchange for all of its stock. The Transit Commission of the State of New York terminated the contract on November 1, 1925. The parties agree that the transaction whereby Artemas Ward transferred the contract to Artemas Ward, Inc., was one in which no gain or loss was recognized (section 202 [c] of the Revenue Act of 1921), and, therefore, the basis for gain or loss to the corporation on this contract, under the applicable provisions of the Revenue Act of 1926, is the same as the basis would be if [fol. 45] the contract had remained in the hands of Artemas Ward. See section 204 of the Revenue Act of 1926. They also agree that this basis is the fair market value of the contract on March 1, 1913, to wit, $3,028,096.42. Furthermore, there is no difference between the parties as to the amount of the deductions allowable under the various revenue acts to Artemas Ward, the individual, and to Artemas Ward, Inc.

The Commissioner has actually allowed deductions on account of the exhaustion of this contract in excess of the amount allowable. The petitioners concede that total deductions on account of the exhaustion of this contract,

equal to the fair market value of the contract on March 1, 1913, have been properly allowed for periods prior to January 1, 1925. This rather unusual situation, where the entire basis has been deducted prior to the actual exhaustion of the contract, is explained by the fact that for a part of the year 1922, and for all of the year 1923, deductions were allowed to the corporation based upon the cost of the contract to the corporation, as provided by the Revenue Act of 1921. The corporation issued its stock for the contract. The value of the stock was the same as the value of the contract. At that time the contract was apparently much more valuable than it was on March 1, 1913, and for each of those two periods the deduction allowed and allowable far exceeded the annual deduction allowed for other years under the other revenue acts which provided that the basis for depreciation was the March 1, 1913, value.

The corporation claims that it sustained a deductible loss in 1925 on account of the termination of the contract, and [fol. 46] it now contends that this loss is measured by the difference between the March 1, 1913, value of the contract and $1,730,578.36, the deductions for exhaustion of the contract allowable to Artemas Ward, Inc. The Commissioner has allowed no loss. He contends that the basis of the March 1, 1913, value should be reduced, not only by the deductions for exhaustion of the contract allowance to Artemas Ward, Inc., but also by the deductions for exhaustion of the contract allowable to Artemas Ward, the individual. Thus reduced, the basis disappears and there is nothing left to be deducted as a loss. This is the sole difference between the parties which we are asked to consider for the year 1925.

Congress has permitted deductions to be taken for losses under certain circumstances. But one claiming such a deduction must have sustained a loss (Cf. United States v. Flannery, 268 U. S. 98), and must be able to point to some specific provision allowing the deduction. The Revenue Act of 1926, which is applicable to the calendar year 1925, provides in section 202 that the loss shall be the excess of the basis over the amount realized after the basis has been "diminished by the amount of the deductions for exhaustion, wear and tear, obsolescence, amortization, and depletion which have since the acquisition of the property been allowable in respect of such property under this Act or prior income tax laws * * *." Section 202 (b) (2).

The contract in question was apparently canceled without any recourse on the part of the corporation. The petitioners argue that the words "since the acquisition of the property" mean since the acquisition of the property by [fol. 47] the one claiming the loss. Thus they would not diminish the basis by the deductions for exhaustion which were allowable in respect of the property during the time that it was owned by Artemas Ward. The respondent contends that the diminution of the basis is not so limited. The case of Barnett Anchor Oil Co., 25 B. T. A. 746, relied upon by the petitioners, is not in point. There may be room for argument that this particular provision of the statute is not entirely clear, but we think that the intention of Congress is clear when the various provisions of the statute relating to this subject are considered together.

Normally, under the income tax acts gain or loss from an exchange of property for stock is recognized, the property in the hands of the new owner has a new basis for gain or loss, and deductions for exhaustion of the property are computed upon that same basis. The new basis is cost to the new owner. The present question would not arise were it not for exceptions to these general rules. Congress made an exception where an owner of property transferred it to a corporation for stock of that corporation and immediately after the transfer controlled the corporation. It said that under such circumstances no gain or loss to the transferor would be recognized. But it did not stop there. It made other special provisions so that neither the Government nor the taxpayers would be hurt as a result of the nonrecognition of gain or loss. These provisions in effect put the transferee in the transferor's place for tax purposes in so far as that particular property was concerned. Congress provided that the old basis for gain or loss on [fol. 48] the property should persist and apply to the property in the hands of the new owner. It also provided, in acts after the 1921 Act, that depreciation should be computed upon this same basis. The relationship between the old owner and the new was close and it was because of that fact that no gain or loss was recognized upon the transfer. The provisions protected both the Government and the taxpayers. The combination of transferor and transferee was to have neither greater nor less tax benefit from the exhaustion in use or from the disposition of the property than the return through tax free income of the transferor's basis.

If the petitioners' contention were correct, the Government would be the loser in every case through a duplication of deductions on the same asset. There would be no point in using the March 1, 1913, value as the basis for gain or loss and reducing it by less than the entire amount recovered through deductions for depreciation since March 1, 1913.

The Supreme Court of the United States has said that "the amount of the allowance for depreciation is the sum which would be set aside for the taxable year, in order that, at the end of the useful life of the plant in the business, the aggregate of sums set aside will (with the salvage value) suffice to provide an amount equal to the original cost." United States v. Ludey, 274 U. S. 295. The whole purpose of the deductions for depreciation and of the offset against the amount realized upon disposition of an asset, is to provide, from untaxed income, an amount equal to the basis. Where the basis has once been recovered through [fol. 49] such annual deductions, there is no portion of the basis left with which to offset the amount realized from the disposition of the property. If anything is recovered from the disposition of the property or from the use of the property over and above the basis, that amount is income. Likewise, where there has been a full recovery through annual deductions for exhaustion, there can be no loss thereafter if the property is taken away from the owner or its usefulness is otherwise terminated. The above statements are certainly true when applied to property continuously owned by the same taxpayer. Graves, Cox & Co., 27 B. T. A. 546; Elliott-Granite Linen Corp., 26 B. T. A. 936; Proximity Mfg. Co., 18 B. T. A. 691, 698, 699; Gardner Printing Co., 4 B .T. A. 37; Even Realty Co., 1 B. T. A. 355. In our opinion Congress intended to provide and did provide in the Revenue Act of 1926, where an asset is transferred by an individual to a corporation for the stock of the latter, and no gain or loss is recognized, that the two combined are entitled to offset against income the total basis of the transferor and no more. Any further allowance would result in a duplication of deductions for the same capital asset, and any less would not permit the taxpayer to recover the full basis tax free. The petitioners are not entitled to any deduction for 1925 representing loss upon the cancellation of this contract, for there was no loss based

upon March 1, 1913, value. Cf. United States v. Flannery, supra.

The only issue touching the year 1926 relates to the method of computation of gain to the United Brokerage Co. upon the sale by it of the capital stock of Artemas [fol. 50] Ward, Inc., a New York corporation. On June 30, 1925, the United Brokerage Co., of the affiliated group which is before us, acquired all of the outstanding capital stock of Artemas Ward, Inc., consisting of 4,964 shares of no par value common stock, at a cost of $3,414,345.63. On December 31, 1925, Artemas Ward, Inc., pursuant to a plan of reorganization, transferred all of its assets, except cash and accounts receivable aggregating $284,967.21, subject to all of its liabilities, to another corporation of the same name, organized under the laws of the State of Delaware, in exchange for all of the latter's stock, consisting of 100 shares of no par value common. The net value of the assets of the New York corporation on December 31, 1925, was $1,246,920.07. On the same day, but after the transfer, the New York corporation, pursuant to the plan of reorganization, distributed the 100 shares of stock in the Delaware corporation and accounts receivable aggregating $234,967.21 to its sole stockholder, the United Brokerage Co., without the surrender by the latter of its stock in the New York corporation. After this transfer, the New York corporation had no liabilities and its only asset was $50,000 in cash. In December, 1926, the United Brokerage Co. sold all of the stock of Artemas Ward, Inc., the New York corporation, 4,964 shares, to an outside party for a total consideration of $49,640. The United Brokerage Co. filed a consolidated return for 1926 in which it claimed a deduction of $3,062,314.54 as a loss resulting from the sale of the stock of the New York corporation. In computing this loss it apportioned the original cost of the stock of the New York corporation between 4,964 shares of the stock [fol. 51] of the New York corporation and 100 shares of the stock of the Delaware corporation in proportion to the number of shares of each which it held. It thus allocated to the 100 shares of stock of the Delaware corporation $67,423.88 as a basis for gain or loss and it allocated to the 4,964 shares of the stock of the New York corporation $3,346,921.75 as a basis for gain or loss. It then reduced

the basis attributable to the shares of the New York corporation by $234,967.21, representing the value of accounts receivable of that corporation distributed to the United Brokerage Co. in December, 1925. The Commissioner, in determining the deficiencies for 1926, has allowed a loss of $495,696.76, which he computed in accordance with Treasury Decision 4274, which was promulgated on November 13, 1929, to amend article 1599 of Regulations 69, C. B. VIII-2, p. 240. The difference between his method of computation and that used by the taxpayer is that the respondent divided the original cost of the 4,964 shares of stock in the New York corporation between that stock and the stock of the Delaware corporation in proportion to the value of each stock at the date of reorganization and distribution, December 31, 1925. In this way he determined that the basis for gain or loss on the 4,964 shares of stock of the New York corporation was $780,303.97. He reduced this basis by $234,967.21, the value of the accounts receivable distributed to the United Brokerage Co., and then subtracted the total sale price of the shares, to wit, $49,640, which gave a loss on the sale of $495,696.76.

Although this case arises under an earlier revenue act and an earlier regulation is relied upon by the petitioners [fol. 52] than was the case in Bertha G. Bamberger, 27 B. T. A. 785, nevertheless the question here is the same as that decided by the Board in the Bamberger case. The petitioners apparently contend that the loss as computed on the consolidated return was in accordance with paragraph 1 of article 1599 of Regulations 69 as originally promulgated. It is to be regretted that such a regulation was published and allowed to stand for so many years, but, if the petitioner's contention is correct, the case demonstrates the unreasonableness of that regulation. All of the assets of the New York corporation were taken from it with the exception of $50,000 in cash, so that the 4,964 shares were backed by nothing more than $50,000 in cash. The 100 shares of Delaware corporation stock were backed by practically all of the remaining assets which had formerly belonged to the New York corporation. The net value of these assets was almost a million dollars, yet, under the petitioner's method, $3,111,954.54 of the original basis would be attributed to the New York stock and only $67,423.88 of the basis would be allocated to the Delaware

stock. Following our decision in the Bamberger case, we hold for the respondent on this point.

Decision will be entered under Rule 50.

(Seal.)

[fol. 53] BEFORE UNITED STATES BOARD OF TAX APPEALS.

Docket No. 51,372.

COLLIER SERVICE CORPORATION, Formerly Broadway Subway Advertising Company, Inc., Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

DECISION

Pursuant to the Board's opinion promulgated November 23, 1933, the parties on March 15, 1934, filed a stipulation of tax liability under Rule 50. Therefore, it is

Ordered and Decided that there are deficiencies for the years 1925 and 1926 in the amounts of $6,396.22 and $42,344.51, respectively.

(Signed) J. E. Murdock, Member, United States Board of Tax Appeals.

Enter:

Entered Mar. 20, 1934.

[fol. 54] BEFORE UNITED STATES BOARD OF TAX APPEALS

[Title omitted]

PETITION FOR REVIEW—Filed June 20, 1934

Comes now the petitioner, Collier Service Corporation, formerly Broadway Subway Advertising Co., Inc., by its attorneys, Laurence Graves and Arthur M. Kracke, and respectfully shows:

I

Jurisdiction

Your petitioner on review is a corporation organized under the laws of the State of New York, with principal place of business at 220 West 42nd Street, New York, New York. Your respondent on review is the duly appointed, qualified and acting Commissioner of Internal Revenue of the United States.

The petitioner's gross income and deductions for the years in question were included in consolidated returns for Federal income tax purposes filed by United Brokerage Company, a corporation, with the Collector of Internal Revenue for the Third District of New York, whose office [fol. 55] is located in the City of New York and within the judicial circuit of the United States Circuit Court of Appeals for the Second Circuit.

II

Previous Proceedings

The respondent determined that there were deficiencies in Federal income taxes for the calendar years 1925 and 1926, computed on the basis of the consolidated returns filed by United Brokerage Company and its affiliated corporations for those years. The respondent determined that the amounts of such deficiencies that should be apportioned to and assessed against the petitioner were $7,109.71 for the calendar year 1925 and $42,497.21 for the calendar year 1926 and, in accordance with the provisions of Section 274 of the Revenue Act of 1926, sent to the petitioner by registered mail a notice of said deficiencies. Thereafter the petitioner duly filed an appeal from said notice of deficiency with the United States Board of Tax Appeals, said appeal being assigned Docket No. 51,372.

Thereafter a hearing was held by said Board of Tax Appeals. On November 23, 1933, the Board of Tax Appeals promulgated its opinion and on March 20, 1934, said Board of Tax Appeals entered its final order and decision in said appeal, wherein and whereby the Board of Tax Appeals ordered and decided that there was a deficiency in tax for the calendar year 1925 of $6,396.22 and a deficiency for the calendar year 1926 of $42,344.51.

The opinion of the Board of Tax Appeals is published in 29 B. T. A. 395.

[fol. 56] III

Nature of Controversy

The nature of the controversy is as follows:

For the year 1925 the respondent determined that a loss claimed to have been sustained by Artemas Ward, Inc., a New York corporation, one of the corporations affiliated with the petitioner during that year, should be disallowed. The petitioner claimed that the amount of such loss was not less than $605,619.30. The effect of the disallowance of this loss was to increase the tax liability of the consolidated group and the amount of such liability to be apportioned to the petitioner.

For the year 1926 the respondent determined that a loss of $3,062,314.54 claimed by United Brokerage Company, one of the corporations affiliated with the petitioner for that year, should be allowed in the amount of $495,696.76 and the balance of the amount claimed disallowed. The effect of the disallowance of this loss was to increase the tax liability of the consolidated group and the amount of such liability to be apportioned to the petitioner.

Issue for 1925

During the calendar year 1925 the petitioner was affiliated with 66 corporations, the gross incomes and deductions of which were included in a consolidated return filed by the parent or principal corporation, United Brokerage Company, a Delaware corporation.

[fol. 57] The loss of not less than $605,619.30 claimed by Artemas Ward, Inc., a New York corporation, for the calendar year 1925 was one claimed to have been sustained by that corporation by reason of the cancellation on November 1, 1925, by the Transit Commission of the State of New York, of a contract with Interborough Rapid Transit Company.

Artemas Ward, Inc., was organized as a corporation under the laws of the State of New York prior to March 13, 1922, and acquired on that date the assets of one Artemas Ward, an individual, used by him in the conduct of an advertising, vending and news-selling business, including a

contract with Interborough Rapid Transit Company for the advertising, vending and news-selling privileges within the cars and stations of the subways and elevated railways of that company and affiliated companies. This contract had been acquired by said Artemas Ward prior to March 1, 1913, and the respondent stipulated that this contract had a fair market value on March 1, 1913, of $3,028,096.42. The contract with Interborough Rapid Transit Company so acquired by said Artemas Ward, Inc., would by its terms have expired on December 31, 1928.

In the determination of the Federal income tax liability of said Artemas Ward for the years 1913 to 1921, inclusive, the respondent allowed as deductions in computing net income on account of exhaustion of said fair market value $159,373.50 for 1913 and $191,248.20 for each of the other such years. In the determination of the Federal income tax liability of said Artemas Ward, Inc., for each of the years 1922 and 1923 the respondent allowed a deduction for [fol. 58] the exhaustion of such contract, upon the basis of an increased valuation, in the amount of $766,642.59. The respondent has allowed deductions to said Artemas Ward, Inc., for the exhaustion of said contract for the year 1924 in the amount of $191,248.20 and for the period January 1, 1925 to June 30, 1925, in the amount of $95,624.10. The parties have stipulated that the deduction allowable on account of the exhaustion of said contract for the period July 1, 1925 to October 31, 1925 was $63,749.40.

The loss of not less than $605,619.30 claimed by the petitioner in its petition was arrived at by subtracting from the March 1, 1913, value of $3,028,096.42 deductions for the annual exhaustion thereof since March 1, 1913 to November 1, 1925, at the rate of $191,248.20 per annum. On November 1, 1925, the portion of said March 1, 1913, value remaining after such deductions for exhaustion was $605,619.30.

The respondent in his determination reduced the March 1, 1913, value of said contract of $3,028,096.42 by the deductions allowed by him for the exhaustion of said contract since March 1, 1913, to Artemas Ward, the individual, in the amount of $1,689,359.10 as well as to said Artemas Ward, Inc., a New York corporation, in the amount of $1,883,906.88, and he found that the March 1, 1913, value had been entirely exhausted and, accordingly, disallowed the loss claimed to have been sustained.

It was contended by the petitioner at the hearing before the Board of Tax Appeals and in its brief to that Board that said March 1, 1913, value of said contract of $3,028,096.42 should be reduced only by the aggregate of the [fol. 59] deductions for exhaustion in respect thereof to which said Artemas Ward, Inc., was entitled after said contract was acquired by it, the aggregate of said deductions being $1,730,578.36, and that the loss sustained by reason of the cancellation of said contract on November 1, 1925, was the amount of $1,297,518.06. The Board of Tax Appeals approved the action of the respondent in disallowing the loss originally claimed and found that the petitioner had sustained no deductible loss by reason of the cancellation of said contract.

Issue for 1926

For the calendar year 1926 the petitioner was affiliated with 66 corporations, the gross incomes and deductions of which were included in a consolidated return filed by United Brokerage Company, a Delaware corporation.

On June 30, 1925, United Brokerage Company, a Delaware corporation, affiliated with the petitioner for both years in controversy, acquired the entire issued and outstanding capital stock of Artemas Ward, Inc., a New York corporation, consisting of 4,964 shares of no par value common stock, at a cost of $3,414,345.63. As hereinbefore stated, the principal asset of said Artemas Ward, Inc., was a certain contract with Interborough Rapid Transit Company, which was cancelled on November 1, 1925. On December 31, 1925, the net book value of the assets of said Artemas Ward, Inc., was the sum of $1,246,920.07. On December 31, 1925, pursuant to a plan of reorganization, said Artemas Ward, Inc., a New York corporation, transferred all of its assets subject to liabilities, with the ex- [fol. 60] ception of cash and accounts receivable aggregating $284,967.21, to Artemas Ward, Inc., a corporation organized under the laws of the State of Delaware, in exchange for the issuance to it of 100 shares of no par value common stock, representing all of the capital stock of that company issued and outstanding at that time. Immediately after this transfer and on December 31, 1925, said Artemas Ward, Inc., a New York corporation, distributed to its sole stockholder, said United Brokerage Company, in pursuance

of said plan, said 100 shares of the capital stock of Artemas Ward, Inc., a Delaware corporation, and accounts receivable aggregating $234,967.21, without the surrender by said United Brokerage Company of any of the capital stock of said Artemas Ward, Inc., a New York corporation.

On December 15, 1926, said United Brokerage Company sold 497 shares of the no par value common stock of Artemas Ward, Inc., a New York corporation, for $4,970.00. Thereafter and on December 24, 1926, said United Brokerage Company sold all of the remaining outstanding capital stock of said Artemas Ward, Inc., a New York corporation, consisting of 4,467 shares for $44,670.00.

In the consolidated return filed by said United Brokerage Company for itself and affiliated companies for the year 1926, a deduction of $3,062,314.54 was claimed by said United Brokerage Company as a loss resulting from said sales of stock of Artemas Ward, Inc., a New York corporation, in December, 1926. This loss was computed in accordance with the provisions of Paragraph (1) of Article 1599 of Regulations 69, in force and effect at the time of [fol. 61] said transactions in 1925 and 1926. This subdivision provided that the basis of each share of old and new stock would be the quotient of the basis of the old stock divided by the total number of old and new shares.

Thereafter and on November 13, 1929, the respondent revised said Article 1599 of Regulations 69 and provided that where the new stock was stock of a corporation other than the distributing corporation, the basis of the old stock should be apportioned between the old stock and the new stock in proportion to their respective values at the time of such distribution. Under the regulation as so amended he determined that the loss allowable on account of the sales of said stock of Artemas Ward, Inc., a New York corporation, was the amount of $495,696.76. In the proceedings before the Board of Tax Appeals it was contended by the petitioner that the loss sustained as a result of the sale of stock of Artemas Ward, Inc., a New York corporation, should be determined in accordance with the provisions of Article 1599 of Regulations 69 as originally promulgated. The Board of Tax Appeals held that the loss should be computed under the provisions of Article 1599 of Regulations 69 as revised on November 13, 1929, and sustained the action of the respondent in determining that the loss

realized from the sale of said stock of Artemas Ward, Inc., a New York corporation, was $495,696.76.

IV

Assignments of Error

Petitioner believes and avers that errors were committed [fol. 62] by the Board of Tax Appeals to its damage and prejudice and assigns the following errors:

Errors Affecting the Year 1925.

(1) The Board erred in holding that in determining the amount of loss sustained by Artemas Ward, Inc., a New York corporation, by reason of the cancellation of its contract with Interborough Rapid Transit Company, the basis of said contract, namely, the March 1, 1913, value of $3,028,096.41, should be reduced by deductions for exhaustion in excess of those which would have been allowable to Artemas Ward, an individual, if he had held said contract until the date of its cancellation, November 1, 1925.

(2) The Board erred in holding that in determining the amount of loss sustained by Artemas Ward, Inc., a New York corporation, by reason of the cancellation of its contract with Interborough Rapid Transit Company the basis of said contract, namely, the March 1, 1913, value of $3,028,096.42, should be reduced not only by the deductions for the exhaustion thereof allowed to said Artemas Ward, Inc., a New York corporation, but also by the deductions allowed to the transferor of said corporation, namely, Artemas Ward, an individual.

(3) The Board erred in holding that no loss was sustained by said Artemas Ward, Inc., a New York corporation, by reason of the cancellation of its contract with Interborough Rapid Transit Company on November 1, 1925.

[fol. 63] (4) The Board erred in holding that there was a deficiency in tax for the year 1925 in the amount of $6,396.22.

Errors Affecting the Year 1926

(1) The Board erred in holding that the loss sustained by United Brokerage Company in 1926 upon the sale of the

stock of Artemas Ward, Inc., a New York corporation, should be computed in accordance with the provisions of Article 1599 of Regulations 69, as amended and revised on November 13, 1929.

(2) The Board erred in failing to hold that the provisions of Article 1599 of Regulations 69, promulgated August 28, 1926, were legislative in character, and therefore could not be changed by the Commissioner of Internal Revenue, with or without the approval of the Secretary of the Treasury.

(3) The Board erred in failing to hold that the provisions of Article 1599 of Regulations 69, promulgated August 28, 1926, were legislative in character, and that to permit the retroactive amendment of such provisions at any time would be unjust, arbitrary, confiscatory, and violative of the Fifth Amendment to the Constitution.

(4) The Board erred in failing to hold that the provisions of Article 1599 of Regulations 69, promulgated August 28, 1926, were legislative in character, and that to permit the retroactive amendment of such provisions on November 13, 1929, after the expiration of the time within which such provisions might reasonably be changed, would be unjust, arbitrary, confiscatory and violative of the Fifth Amendment to the Constitution.

[fol. 64] (5) The Board erred in failing to hold that even though the provisions of Article 1599 of Regulations 69, promulgated August 28, 1926, are to be considered administrative or interpretive rather than legislative, the provisions of said article could not legally be changed after the reenactment of Section 204(a)(9) of the Revenue Act of 1926 in successive revenue acts.

(6) The Board erred in failing to hold that the loss sustained by United Brokerage Company in 1926 upon the sale of the stock of Artemas Ward, Inc., a New York corporation, should be computed in accordance with the provisions of sub-paragraph (1) of Article 1599 of Regulations 69, as promulgated on August 28, 1926.

(7) The Board erred in failing to hold that if such loss should not be computed in accordance with the provisions of sub-paragraph (1) of Article 1599 of Regulations 69, as

promulgated on August 28, 1926, it should be computed in accordance with the provisions of sub-paragraph (2) of such article as so promulgated.

(8) The Board erred in failing to hold that if such loss should not be computed in accordance with the provisions of either sub-paragraph (1) or sub-paragraph (2) of Article 1599 of Regulations 69, as promulgated August 28, 1926, it should be computed in accordance with the provisions of Section 201(d) of the Revenue Act of 1926.

(9) The Board erred in holding that there was a deficiency in tax for the year 1926 in the amount of $42,344.51.

[fol. 65] Wherefore, the petitioner asks that the decision of the Board of Tax Appeals be reviewed by the United States Circuit Court of Appeals for the Second Circuit; that a transcript of the record be prepared in accordance with law and with the rules of said Court and transmitted to the clerk of said Court for filing, and that appropriate action be taken to the end that the errors complained of may be reviewed and corrected by said Court.

(Signed) Laurence Graves, 295 Madison Avenue, New York, N. Y. (Sgd.) Arthur M. Kracke, The Rookery, Chicago, Illinois, Counsel for Petitioner.

Duly sworn to by Laurence Graves. Jurat omitted in printing.

[fol. 66] BEFORE UNITED STATES BOARD OF TAX APPEALS

[Title omitted]

PRÆCIPE FOR TRANSCRIPT OF RECORD—Filed Aug. 7, 1934

To the Clerk of the United States Board of Tax Appeals:

You are requested to prepare and certify and transmit to the Clerk of the United States Circuit Court of Appeals for the Second Circuit, with reference to the petition for review heretofore filed by the petitioner in the above cause, a transcript of the record in the above cause, prepared and transmitted as required by law and by the rules of said court, and to include in said transcript of record the following documents or certified copies thereof, to wit:

1. The docket entries of all proceedings before the Board of Tax Appeals.
2. The pleadings before the Board.
3. The stipulation of facts.
[fol. 67] 4. Opinion of the Board of Tax Appeals.
5. The decision of the Board.
6. The petition for review.
7. This præcipe.

Laurence Graves, Attorney for Petitioner, 618 Southern Building, Washington, D. C.

Personal service of the foregoing præcipe is hereby acknowledged this 7th day of August, 1934.

Robert H. Jackson, Assistant General Counsel for the Bureau of Internal Revenue, Attorney for Respondent.

[fol. 68] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 69] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

MANHATTAN GENERAL EQUIPMENT CO., Petitioner,

against

COMMISSIONER OF INTERNAL REVENUE, Respondent

SECOND CIRCUIT

COLLIER SERVICE CORPORATION, Formerly SUBWAY ADVERTISING CO., INC., Petitioner,

against

COMMISSIONER OF INTERNAL REVENUE, Respondent

Before: Manton, Augustus N. Hand and Chase, Circuit Judges

Petitions for review of decisions of the United States Board of Tax Appeals.

From orders of the Board of Tax Appeals deciding that there were income tax deficiencies of the Manhattan General Equipment Company for the years 1925 and 1926 in the amounts of $485.02 and $299.94, respectively, and of Collier Service Corporation for the years 1925 and 1926 in the amounts of $6,396.22 and $42,344.51 respectively. Affirmed.

The petitioners are affiliates of United Brokerage Company. That corporation filed income tax returns for itself and [fol. 70] its affiliates for 1925 and 1926 and the petitioners seek to review tax deficiencies attributed to them by the Commissioner, which the Board of Tax Appeals has affirmed. For a number of years prior to March 1, 1913, Artemas Ward owned a contract, controlling advertising, vending and news selling privileges within cars and stations of the subways and elevated railways of the Interborough Rapid Transit Company in New York City, which the Commissioner of Internal Revenue determined had a value of $3,028,096.42 on that date. The contract by its terms was to continue in existence until December 31, 1928.

On March 13, 1922, Artemas Ward transferred his contract with the Interborough Rapid Transit Company to

Artemas Ward, Inc., a New York corporation, in exchange for all of its stock. On June 30, 1925, the United Brokerage Company purchased for $3,414,345.63 in cash all the capital stock of Artemas Ward, Inc., that was issued and outstanding consisting of 4,964 shares of no par value. On November 1, 1925, the New York Transit Commission cancelled the Interborough contract.

In assessing the income taxes for the year 1925 for United Brokerage Company and in order to ascertain whether there was any loss during that year caused by the cancellation of the contract, the Commissioner of Internal Revenue allowed as deductions on account of the exhaustion of the March 1, 1913 value of the contract between that date and March 13, 1922, when Artemas Ward assigned it to Artemas Ward, Inc., (New York) the sum of $1,726,560.76 and allowed as deductions between March 13, 1922, and November 1, 1925, when it was cancelled by the Transit Commission, the sum [fol. 71] of $1,730,578.36. If both sums be allowed, the United Brokerage Company has suffered no loss from the cancellation of the contract for they exceed $3,028,096.42, the March 1, 1913, value which was the base. The United Brokerage Company filed a return for the year 1925 for itself, the petitioners and other affiliates. It claims as a loss due to the cancellation of the contract the difference between the base of $3,028,096.42 and the sum of $1,730,578.38 allowed for exhaustion between the date of acquisition on March 13, 1922 and the date of cancellation on November 1, 1925, or $1,297,518.06. The question whether this sum should be allowed as a loss is the first point raised on these appeals.

On December 31, 1925, pursuant to a plan of reorganization, Artemas Ward, Inc. (N. Y.) transferred to Artemas Ward, Inc. (a Delaware corporation), in exchange for 100 shares of stock of the latter company of no par value, all its assets, then of a net book value of $1,246,920.07, with the exception of cash and accounts receivable aggregating $284,967.21—that is to say, the New York corporation transferred to the Delaware corporation assets of the value of $961,952.86. Immediately after the transfer, and on December 31, 1925, Artemas Ward, Inc. (N. Y.) distributed to United Brokerage Company the 100 shares of stock of Artemas Ward, Inc. (Del.) and accounts receivable amounting to $234,967.21. In December, 1926, United Brokerage

sold the entire 4,964 shares of Artemas Ward, Inc. (N. Y.) for $49,640. That stock had cost the United Brokerage $3,414,345.63 and the total must be apportioned between the 100 shares of the Delaware corporation (which it still owns) and the 4,964 shares of Artemas Ward, Inc. (N. Y.) in [fol. 72] order to determine the loss suffered by the United Brokerage Company through its sale of the 4,964 shares at $49,640. The Commissioner fixed the base value of the stock of the New York corporation after the reorganization, pursuant to Article 1599 (2) of Treasury Regulations 69 promulgated August 28 ,1926, as amended November 13, 1929. Article 1599 (2) (as amended) provided that:
"the cost or other basis of the stock in respect of which the distribution is made shall be apportioned between such stock and the stock or securities distributed in proportion, as nearly as may be, to the respective values of each class of stock or security, old or new, at the time of such distribution, * * *"

Upon the reorganization, the New York corporation had left among its assets, valued at $1,246,920.07, accounts receivable and cash aggregating $284,967.21, or approximately 22.85% thereof, after $961,952.86 had been transferred to the Delaware Company. Under Art. 1599 (2) supra, the portion of $3,414,345.63 paid by the United Brokerage Company for the stock of Artemas Ward, Inc. (N. Y.) represented by that stock after the reorganization was $780,303.97. If from this be deducted $234,967.21 accounts receivable and the $49,640 realized from the sale in December, 1926, there would be a loss of $495,696.76. This loss the Commissioner allowed in assessing the income tax for 1925. The second point raised on this appeal is whether the loss, for the year 1926, to which the United Brokerage Company and its affiliates were entitled was only the sum of $495,696.76 or was the sum of $2,167,785.56 which would arise through deducting from $3,414,345.63, (the cost of the stock of the New York company) the value [fol. 73] at the time of the reorganization of the Delaware stock which was $961,952.86 and $234,967.21 realized from accounts receivable and $49,640 realized from sale of the 4964 shares.

Laurence Graves and A. M. Kracke, Attorneys for petitioners, Caruthers Ewing, Counsel.

Frank J. Wideman, Assistant Attorney General for respondent; Sewall Key and Helen R. Carloss, Special Assistants to the Attorney General, Counsel.

AUGUSTUS N. HAND, Circuit Judge:

The first question before us is whether there was any deductible loss in 1925 because of the cancellation of the contract between Artemas Ward and Interborough Rapid Transit on November 1, 1925. This depends on whether the deductions for exhaustion allowed to Artemas Ward between March 1, 1913, and March 13, 1922, when the latter transferred the contract to Artemas Ward, Inc. (N. Y.) in exchange for all the stock of that corporation should be added to the deductions for exhaustion allowed to Artemas Ward, Inc. (N. Y.) between the date of transfer and the time of cancellation. If the allowances granted to Artemas Ward and to his transferee Artemas Ward, Inc. (N. Y.) may all be taken into account, no part of the March 1, 1913, value of the contract would remain, so that there would be no deductible loss due to the cancellation on November 1, 1925.

[fol. 74] The contract transferred by Artemas Ward to Artemas Ward, Inc. (N. Y.) was acquired by the latter pursuant to such a non-taxable exchange as is described in Section 203 (b) (4) of the Revenue Act of 1926 which provides that:

"(4) No gain or loss shall be recognized if property is transferred to a corporation by one or more persons solely in exchange for stock * * * in such corporation, and immediately after the exchange such person or persons, are in control of the corporation; * * *."

Section 204 (a) of the same Act provides that:

"The basis for determining the gain or loss from the sale or other disposition of property acquired after February 28, 1913; shall be the cost of said property; except that—

"(8) If the property * * * was acquired after December 31, 1920, by a corporation by the issuance of its stock * * * in connection with a transaction described in paragraph (4) of subdivision (b) of Section 203 * * *, then the basis shall be the same as it would be in the hands

of the transferor, increased in the amount of gain or decreased in the amount of loss recognized to the transferor upon such transfer under the law applicable to the year in which the transfer was made;"

In spite of the fact that the transfer of the contract from Artemas Ward to Artemas Ward, Inc. (N. Y.) was under Section 203 (b) (4) supra a non-taxable exchange and the basis for determining the disposition of the contract was under Section 204 (a) (8) the same as it would be in the [fol. 75] hand of the transferor, the petitioners argue that the basis should only be diminished by the amount of the deductions for exhaustion which were allowable after Artemas Ward, Inc. (N. Y.) acquired the contract. This argument is founded on Section 202 (b) of the Act of 1926 which says that in computing the amount of gain or loss from the disposition of property:

"(2) The basis shall be diminished by the amount of the deductions for exhaustion, wear and tear, obsolescence, amortization and depletion which have since the acquisition of the property been allowable in respect of such property under this Act or prior income tax laws;"

The petitioners contend that the word "acquisition" means acquisition to the taxpayer. But where there has been a non-taxable exchange we think the "acquisition" referred to is that of the transferor. It is impossible to see why different rules should be employed for determining profit or loss where items of exhaustion are or are not allowable and where property that has been the subject of a non-taxable exchange is sold or otherwise disposed of. The purpose of the statutory provisions we have quoted was to disregard the corporate intervention when computing gain or loss in such cases. Under Section 204 (a) (8) the basis is "the same as it would be in the hands of the transferor increased in the amount of gain and decreased in the amount of loss recognized to the transferor." To allow deductions for exhaustion under a different principle or in a more limited way would contravene the entire theory ap- [fol. 76] plicable to non-taxable exchanges. Perthur Holding Corp. v. Commissioner, 61 Fed. (2d) 785, (C. C. A. 2); American Compress & Warehouse Co. v. Bender, 70 Fed. (2d) 655. The Board of Tax Appeals properly took into

account items allowed for exhaustion when the contract was in the hands of the transferor and rightly disallowed any loss through cancellation because the value had already been exhausted.

It is now necessary to deal with the second point raised by the taxpayer. That is whether the loss on the sale of the 4,964 shares of Artemas Ward, Inc. (N. Y.) which the United Brokerage Company and its affiliates were entitled to was $2,167,785.56 as claimed, or was only $495,696.76, the loss allowed by the Board. This depends on what portion of the amount paid for the stock by United Brokerage Company is allocable to the stock of Artemas Ward, Inc. (N. Y.) and what portion to the stock of Artemas Ward, Inc. (Del.). This in turn depends on whether Article 1599 (2) of Regulations 69 should be applied in its original form or as it stood after amendment in 1929.

Section 203 (c) of the Act of 1926 provides that, if there is distributed, to a shareholder in a corporation, a party to a reorganization, stock in such corporation or in another corporation, a party to the reorganization, without the surrender by the shareholder of the stock originally held, no gain to the stockholder shall be recognized. Section 204 (a) (9) provided that where (as here) such distribution was made after December 31, 1923, "the basis, in the case of the stock in respect of which the distribution was made shall be apportioned, under rules and regulations prescribed by the Commissioner with the approval of the Secretary, between such stock and the stock or securities distributed."

The question is whether Article 1599 (2) supra applies in [fol. 77] its earlier form or as later amended on November 13, 1929. Before the amendment, Article 1599 (2) read thus:

"Where the stock distributed in reorganization is in whole or in part of a character or preference materially different from the stock in respect of which the distribution is made, the cost or other basis of the old shares of stock shall be divided between such old stock and the new stock in proportion, as nearly as may be, to the respective values of each class of stock, old and new, at the time the new shares of stock are distributed, and the basis of each share of stock will be the quotient of the cost or other basis of the class with which such share belongs, divided by the number of shares in the class. The portion of the cost or other

basis of the old shares of stock to be attributed to the shares of new stock shall in no case exceed the fair market value of such shares as of the time of their distribution."

Where the new stock is stock of a corporation different from the old, it has been treated as stock of "a character or preference materially different" within the meaning of the foregoing regulation. Accordingly, if Article 1599 (2) as it read at the time of the sale of the 4,964 shares of Artemas Ward, Inc. (N. Y.), be applied, the last sentence of (2) would entitle the United Brokerage Company to a loss of $2,167,785.56. This is because the portion of the cost of the old stock to be attributed to the new stock could not exceed the fair market value of the 100 shares of stock of [fol. 78] Artemas Ward, Inc. (Del.), at the time of the distribution of the latter. As we have shown in the statement of facts the value of the latter stock at that time was $961,952.86. If $961,952.86 be deducted from $3,414,345.63 (the cost of the shares of Artemas Ward, Inc. (N. Y.), to United Brokerage Company) there would remain $2,452,392.77 as the base or proportion of the cost of the old stock applicable thereto after the reorganization. If from $2,452,392.77 be deducted $234,967.21 of accounts receivable distributed by Artemas Ward, Inc. (N. Y.), to United Brokerage Company, and $49,640 realized by the Untied Brokerage Company from the sale of the 4,964 shares of stock of Artemas Ward, Inc. (N. Y.), we have a balance amounting to $2,167,785.56—the loss claimed by the taxpayer.

Limitation by the last sentence of Subd. (2) supra to the fair value of stock of Artemas Ward, Inc., (Del.) at the time of distribution would make the proportion of cost to United Brokerage Company represented by that stock only about 28%, though the Delaware Company had received 77.15% of the assets of the old company. Doubtless, because such a limitation was thought to attribute in situations like the present too small a proportion of the basic cost to the stock of the new corporation distributed to stockholders through a reorganization, the Commissioner amended Article 1599 (2) on November 13, 1929, by omitting the last sentence of Subdivision (2). Applying the regulation as amended, he computed the loss on the sale of the stock of Artemas Ward, Inc., (N. Y.) at $495,696.76. The Board by employing that loss in determining the income of

the affiliated corporations arrived at the income tax de-
[fol. 79] ficiencies under review. We cannot see that the method of apportionment required by the amendment was unreasonable and if the Commissioner had the right to apply the Regulation, as amended in 1929, to prior transactions under which the taxpayers would be entitled to deduct a larger loss, the decisions of the Board were right.

The taxpayers argue that the Commissioner had no right to apply the Regulations, as amended, to prior transactions and cite Arizona Grocery v. Atchison Ry., 284 U. S. 370, in support of their contention. But Gt. Northern Ry. v. Sunburst Co., 287 U. S. 358, indicates that the former decision does not govern the present situation. The latter decision shows that if under power to adopt Regulations delegated by Congress to the Commissioner authority is given to change the Regulations, the Regulations are to the extent of that power tentative as to any matters affected, and that the changed Regulations, if reasonable, may be applied retroactively. In Gt. Northern Ry. v. Sunburst, 287 U. S. 358, this principle was applied in the case of freight rates which had been charged under a power to fix and to change the same delegated by the State of Montana to its Board of Railroad Commissioners. The rates were afterwards lowered by the State Board and the shipper was allowed to recover the excess from the carrier. In Titsworth v. Commissioner, 73 Fed. (2d) 385, (C. C. A. 3) the very argument presented here of the inability of the Commissioner to apply amended Article 1599 (2) retroactively was made without avail. Cf. Burnet v. S. & L. Bldg. Corp., 288 U. S. 406.

There can be no doubt that Congress has power to make
[fol. 80] income tax laws retroactive. Brushaber v. Union Pac. Ry., 240 U. S. 11. This is especially true where they only affect deductions that may be taken from income, which are always matters of legislative favor. Under the Revenue Acts of 1924 and 1926 the Commissioner was given discretion to apply his regulations without retroactive effect if the reversal of a former ruling was not immediately occasioned by a decision of a court of competent jurisdiction. Act of 1924, § 1008 (a); Act of 1926, § 1108 (a). Under the Act of 1928, § 605 (c), the Commissioner was given the same discretion without the limitation as to how the change in his former ruling was occasioned. Under the Act

of 1934, § 506, the 1982 provision was practically reiterated. Each of these enactments shows that the Regulations of the Commissioner are to be regarded as tentative for the reason that amendments are retroactive unless stated to be otherwise. Accordingly the Regulations in question are to be treated as retroactive to the date of the law to which they are applicable.

Orders affirmed.

Manton, J., dissenting in a separate opinion.

[fol. 80½] [Endorsed:] United States Circuit Court of Appeals. Second Circuit. Manhattan General Equipment Co., against Commissioner of Internal Revenue. Collier Service Corporation, etc., against Commissioner of Internal Revenue. Opinion. Augustus N. Hand, C. J.

[fol. 81] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

MANHATTAN GENERAL EQUIPMENT CO., Petitioner,

against

COMMISSIONER OF INTERNAL REVENUE, Respondent.

COLLIER SERVICE CORPORATION, Formerly SUBWAY ADVERTISING CO., INC., Petitioner,

against

COMMISSIONER OF INTERNAL REVENUE, Respondent.

MANTON, Circuit Judge (Dissenting).

This appeal involves income taxes for 1925 and 1926, of both petitioners. The questions presented are (1) where a corporation which acquired a contract in a nontaxable exchange for stock pursuant to a transaction described in § 203 (b) (4) of the Revenue Act of 1926, and hence under § 204 (a) (8), is required to use the basis of the transferor in measuring the loss from the cancellation of that contract, should that basis be reduced by the amount of deductions for exhaustion allowable to the corporation taxpayer only or by the total exhaustion allowable to both the taxpayer and the transferrer; and (2) whether the loss sustained in 1926

on the sale of stock, received in a non-taxable distribution [fol. 82] in pursuance of a plan of reorganization, should be determined upon the basis of regulations in effect in 1926 (Art. 1599, Regulations 69), or upon the basis of an amended regulation promulgated in 1929 (Art. 1599, Regulations 69).

Artemus Ward, prior to March 1, 1913, had a contract for advertising, vending and news selling privileges on the cars and stations of the subways and elevated railways of the Interborough Rapid Transit Co. The fair value of this contract was appraised by the Commissioner, as of March 1, 1913, at $3,028.096.42. March 13, 1922, Artemus Ward transferred this contract to a New York corporation, Artemus Ward Inc., in exchange for the stock of the corporation. The United Brokerage Company which filed a consolidated return with the petitioners, purchased the entire issued and outstanding capital stock of Artemus Ward Inc., consisting of 4,964 shares of no par value, on June 30, 1925, for $3,414,345.63. This contract was cancelled November 1, 1925. In the consolidated return filed by the United Brokerage Co. for 1925, the income and deductions of Artemus Ward Inc. were included for the period of July 1 to December 31, 1925. One deduction claimed by Artemus Ward Inc. was a loss resulting from the cancellation of the contract, and it was disallowed by the respondent. In the petition filed with the Board, petitioner claimed a deduction for the loss sustained, in the sum of $605,619.30. This was computed by reducing the March 1, 1913 valuation of $3,028,096.42 by annual deductions for the exhaustion of the life of the contract on the basis of a remaining life on March 1, 1913 of 15 5/6 years. The exhaustion so computed [fol. 83] amounted to $2,422,477.12, leaving an unexhausted March 1, 1913 value of $605,619.30. The respondent computed the amount of exhaustion allowable both to the transferor Artemus Ward, the individual, and to the transferee, Artemus Ward Inc., in terms of March 1, 1913 value, at the rate of $191,248.20 per year, except in 1922 and 1923, when an allowance was permitted for exhaustion of the contract in the amount of $766,642.59 for each of the two years. The deductions allowable for exhaustion of the contract during the period it was owned by Artemus Ward Inc. were $613,-314.07 for 1922, and $766,642.59 for 1923, based upon the

value at the date of the acquisition of the contract by Artemus Ward, Inc. on March 13, 1922.

The plan of reorganization referred to in the prevailing opinion became effective during 1925, and in 1926, the United Brokerage Co. sold the shares of Artemus Ward Inc. (N. Y.) for $49,640.

In its return for 1926, the United Brokerage Co. claimed a deduction of $3,062,314.54 as a loss resulting from the sale of the stock of Artemus Ward Inc. (N. Y.). This loss was computed in accordance with the provisions of subdiv. (1) of Art. 1599, Regulations 69, then in effect for sales made in 1926. But the respondent applied the provisions of Art. 1599 (2) of Regulations 69, as amended November 13, 1929, and determined the loss sustained to be $495,696.76. The distribution to the United Brokerage Co. on December 31, 1925, of the stock of Artemus Ward Inc. (Del.), worth $961,952.86 and accounts receivable worth $234,967.21 was followed, in December 1926, by the sale of the stock of the Artemus Ward Inc. (N. Y.) for $49,640 and this made it possible to ascertain the amount of the loss which had been [fol. 84] sustained by the parent company. It paid $3,414,345.63 for the stock of the New York corporation, and it received assets worth only $1,246,560.07 and therefore suffered a loss of $2,167,785.56 on the transaction.

Pursuant to § 204(a) (8), the basis for determining the gain or loss from the sale of the contract in the hands of Artemus Ward Inc. was the same as it would be in the hands of Artemus Ward the transferor—$3,028,086.42. The reason the loss sustained by cancellation of the contract was disallowed, was that the aggregate amount of the deductions allowed or allowable for the exhaustion of the contract to Artemus Ward, the transferor, from March 1, 1913 to March 13, 1922, and to Artemus Ward Inc. subsequent to the time said contract was acquired by it on March 13, 1933, and prior to November 1, 1925, was in excess of the basis of $3,028,096.42. Under the provisions of § 202(b) (2) of the Revenue Act of 1926, the basis to Artemus Ward Inc. of $3,028,096.42 is reduced only by the aggregate of deductions allowable to it for exhaustion of such contract during the period the contract was owned by it. The aggregate amount of the deductions allowable to it for the exhaustion was $1,730,578.36; thus Artemus Ward Inc. suffered a loss of $1,297, 518.06. The value of this contract

to the transferee, Artemus Ward Inc., must be computed undiminished by any exhaustion allowed or allowable to the transferor, Artemus Ward. It should not include any deductions for exhaustion which may have been allowed or allowable to the transferor Artemus Ward prior to March 13, 1922.

[fol. 85] Section 203(c) of the Revenue Act of 1926 provides that if there was distributed to a shareholder in a corporation a party to a reorganization, stock in such corporation or in another corporation a party to the reorganization, without the surrender of the stock originally held, no gain to the shareholder should be recognized. Section 204 (a) (9) provides that in such cases the basis of the old stock should be apportioned between the old and new stock under rules and regulations prescribed by the Commissioner. Regulations 69, Art. 1599, promulgated August 28, 1926, provided that where the new stock was of substantially the same character or preference as the old stock, the basis of each share should be determined by dividing the cost of the old stock by the total number of old and new shares. Paragraph 2 provided that where the new stock was of a character or preference materially different from the old stock, the cost of the latter should be divided between the old and the new stock in proportion to the respective values of each class of stock at the time of distribution, but with the proviso that the basis of the old shares of stock to be attributed to the new stock shall in no case exceed the fair market value of such shares as of the time of their distribution. Thus, if the allocation is to be made under para. 2 of Art. 1599, the cost of the old stock should be divided between the old and the new in proportion to the respective values of each class; the amount to be attributed to the new stock not to exceed the value of such stock under the limitation contained in the article as then promulgated. The value of the new stock was $961,952.86; the remainder of the [fol. 86] cost of $3,414,345.63, that is, $2,452,392.77, should be allocated to the old stock, and after deducting the accounts receivable and the sum received when the old stock was sold, there was a loss of $2,167,785.56. This is the actual loss sustained by the United Brokerage Co. as shown in the statement of facts.

The prevailing opinion holds that the original article is inapplicable by reason of the promulgation, on November

13, 1929, of an amendment to Art. 1599 of Regulations 69, providing explicitly that where the stock distributed was stock in a corporation other than the distributing corporation, the basis of the old stock should be apportioned under para. 2 of the article, omitting the last sentence of the original article. The prevailing opinion thus applies the amended article to the distribution made by Artemus Ward Inc. on December 31, 1925, retroactively. Great Northern Ry. v. Sunburst Co. (287 U. S. 358) is relied upon.

In Arizona Grocery Co. v. Atchison, T. & S. F. Ry. Co. (284 U. S. 370), the holding of the court was that when the Interstate Commerce Commission declares a certain rate to be a reasonable rate, it speaks as the legislature and its pronouncement has the force of a statute, the Interstate Commerce Commission in naming the rate, speaking in a quasi-legislative capacity. This being so, the court held that the Interstate Commerce Commission cannot, by a later provision, declare its own finding of reasonableness to be erroneous and subject a carrier which conformed thereto, to a reparation measured by what the Interstate Commerce Commission later holds it should previously have [fol. 87] decided. The Great Northern Ry. case (supra), in no way changed this holding. In that case, the court held that where it is clear to all concerned that a rate as fixed is but tentative and provisional, the rate may be changed retroactively. The court found that notice had been given to all that the rate was subject to retroactive change. The court said that the Arizona case (supra), was not in conflict with such view, because Congress had not there intended that the Interstate Commerce Commission have power to change rates retroactively. The Great Northern case in no way implied, as might be concluded from the prevailing opinion, that the mere power to change regulations makes such regulations only tentative, and therefore capable of being applied retroactively when changed. The very "meat" of the Great Northern case was that all concerned knew and understood that the rates, as fixed, were originally tentative, not that they were simply subject to change. Where regulations are only subject to change, but are not understood to be tentative, the Arizona case (supra) applies, and they cannot be applied retroactively.

Prior to the enactment of the 1926 Act, the authority of the Commissioner arbitrarily to decide whether or not later

regulations were to be applied retroactively was seriously questioned. As a result, the Act of 1926 (§1108[a]) gave the Commissioner a wide discretion. The discretion was not to apply it with retroactive effect, but without retroactive effect. The 1928 Act is in the same terms (§605, Act of 1928). "The purpose of the above provision of law is to prevent the constant reopening of cases on account of [fol. 88] changes in regulations or treasury decisions." Prentice-Hall Tax Service (1934) §21,207. The 1934 Act (§506) provides that the Secretary or Commissioner, with the former's approval, may prescribe the extent, if any, to which any regulation shall be applied "without retroactive effect". See: Report Ways & Means Committee, 1934.*

The retroactivity of an amended regulation may depend upon whether the regulation under discussion declares the law or merely interprets it. If the latter, then the regulation, in reality, has no retroactive effect of itself. [fol. 89] The regulation would be only interpretive of the statute which imposes the tax. If, on the other hand, it is declarative of the law, then the amended regulation might well be invalid if it adversely and unjustly affected the taxpayer. The Report of the Ways and Means Committee recognized the distinction and also that those regu-

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* "The amendment tends the right granted by existing law to the Treasury Department to give regulations and Treasury Decisions amending prior regulations or treasury decisions prospective effect only, by allowing the Secretary, or the Commissioner with the approval of the Secretary, to prescribe the exact extent to which any regulation or Treasury decision, whether or not it amends a prior regulation or treasury decision, will be applied without retroactive effect. * * *" "*Regulations, * * * which are merely interpretive of the statute, will normally have a universal application, but in some cases the application of regulations, * * *, to past transactions which have been closed by taxpayers in reliance upon existing practice, will work such inequitable results that it is believed desirable to lodge in the Treasury Department the power to avoid these results by applying certain regulations, * * * with prospective effect only.*" [Prentice-Hall Federal Tax Service, (1935) §21, 207.]

lations which are of a nature other than merely interpretive, often work inequitable results when applied retroactively. This fact, which was considered a reason for giving the Commissioner discretion to apply regulations non-retroactively, is also a reason for refusing to give a retroactive effect to an amended regulation even though the Commissioner does not exercise his discretion.

Congress di dnot declare, in § 204 (a) (9), the method by which the basis should be apportioned. Rather, it delegated to the Commissioner the power to make rules and regulations for such apportionment with the approval of the Secretary. To say that the Commissioner is merely interpreting the law in such case, is erroneous. Before the Commissioner promulgated Article 1599 of Regulation 69, there was no law in regard to the method to be used in apportioning the basis, and the Commissioner, when he promulgated the article, made the law. The Regulation was not interpretive of the law, because before the Regulation there was no law. The Commissioner acted in what the Supreme Court, in the Arizona Grocery case, supra, called a quasi-legislative manner. Regulations made by the Commissioner in pursuance of his delegated authority, with the Secretary's approval, have the force and effect of statutes. U. S. v. Eliason, 16 Pet. 291; In re Huttman, 70 Fed. 699. And [fol. 90] so, when the Commissioner, in accordance with his delegated power, acts in behalf of Congress in enacting such a regulation as is considered in the instant case, the regulation promulgated by him will be considered declarative of the law, and quasi-legislative in nature. Consequently, the regulation should not be applied with retroactive effect. To do so would be unreasonable and capricious. Untermyer v. Anderson, 276 U. S. 440; Nichols v. Coolidge, 274 U. S. 531; Arizona Grocery Co. v. Atchison, T. & S. F. Ry. Co., supra.

The deduction should be allowed and the decision reversed.

[fol. 90½] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. Manhattan General Equipment v. Commr. of Internal Revenue. Dissenting Opinion. Manton, Circuit Judge.

[fol. 91] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At at Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the Court Rooms in the Post Office Building in the City of New York, on the 22nd day of April, one thousand nine hundred and thirty-five.

Present: Hon. Martin T. Manton, Hon. Augustus N. Hand, Hon. Harrie B. Chase, Circuit Judges.

Appeal from the United States Board of Tax Appeals

This cause came on to be heard on the transcript of record from the United States Board of Tax Appeals, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the order of said United States Board of Tax Appeals be and it hereby is affirmed.

It is further ordered that a Mandate issue to the said Board in accordance with this decree.

Wm. Parkin, Clerk.

[fol. 92] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. Manhattan General Equipment Co. vs. Commissioner of Internal Revenue. Order for Mandate. United States Circuit Court of Appeals, Second Circuit. Filed April 22, 1935. William Parkin, Clerk.

[fol. 93] [Stamp:] United States Circuit Court of Appeals, Second Circuit. Filed Apr. 29, 1935. William Parkin, Clerk.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

MANHATTAN GENERAL EQUIPMENT COMPANY, Petitioner,

against

COMMISSIONER OF INTERNAL REVENUE, Respondent

COLLIER SERVICE CORPORATION, Formerly Subway Advertising Co., Inc., Petitioner,

against

COMMISSIONER OF INTERNAL REVENUE, Respondent

On Petitions for Review of Decisions of the United States Board of Tax Appeals

PETITION FOR A REHEARING

Come now the petitioners, Manhattan General Equipment Company and Collier Service Corporation, formerly Broadway Subway Advertising Co., Inc., by their attorneys, and petition this honorable court for a rehearing in the above entitled causes in which the opinions were filed on April 15, 1935. In support of this petition petitioners assign the following reasons:

[fol. 94] (1) The finding of this court that the loss sustained by United Brokerage Company as a result of the sale in December, 1926, of 4,964 shares of Artemas Ward, Inc. (N. Y.) should be determined under Article 1599 (2) of Regulations 69 as amended November 13, 1929 was based upon Great Northern Railway Company v. Sunburst Oil and Refining Company, 287 U. S. 358, which was not cited or relied upon by either of the parties in the proceedings before this honorable court, and with respect to which the petitioners have not had an opportunity to give this honorable court the benefit of their views regarding the inapplicability of that decision to the issue presented in these proceedings.

(2) It is the view of the petitioners that the application by this court of the decision in Great Northern Railway Co. v. Sunburst Oil and Refining Company, supra, was erroneous in at least two respects.

(a) It was implied that the United States Supreme Court had approved the retroactive amendment of quasi-legislative regulations, whereas that court definitely declined to express any opinion upon the legality of such amendments.

The Board of Railroad Commissioners of Montana had made a retroactive change in the rates for the carriage of freight, and the respondent had recovered a judgment against the complainant which was affirmed upon appeal. In an earlier case, Doney v. Northern Pacific Railway Co., 60 Mont. 209, 199 Pac. 432, which had been decided prior to the collection of the charges complained of in the Great Northern case, the Montana Supreme Court had indicated [fol. 95] that such actions for restitution might be maintained against the carrier, under certain conditions, if the Board determined retroactively that the rates were excessive. The United States Supreme Court held that this earlier decision had written into the Montana statute a notice to all concerned that payments exacted by a carrier were subject to be refunded if found thereafter to be excessive, and that no Federal right was infringed by giving to the statute the meaning that had been ascribed to it by the Montana court, since no such impairment would have resulted if the meaning had been written into the statute by the legislature. The United States Supreme Court did not endorse the interpretation placed upon the statute by the Montana court, but held that the meaning of the Montana statute was a problem for the Montana courts, and not subject to review by itself.

(b) It was implied that the Supreme Court of Montana had approved the retroactive amendment of quasi-legislative regulations, whereas although that court had approved such amendment in an earlier decision, it held in this case that such retroactive amendments were wrong in principle and would not be sustained in the case of future transactions.

The case of Doney v. Northern Pacific Railway Co., supra, in which the court affirmed the shipper's right to recover charges held retroactively to be excessive, was decided in

1921. The transactions complained of in Great Northern Railway Co. v. Sunburst Oil and Refining Company, supra, occurred between August, 1926 and August, 1928. While the Montana Supreme Court held in that case that the ruling in the Doney case was law until reversed and would con- [fol. 96] stitute the governing principle for shippers and carriers who, during the period of its reign, had acted on the faith of it, the court nevertheless decided that the ruling in the Doney case was erroneous and would not be followed with reference to future transactions. The court further held that a rate established by the Commission had the same effect as one established by the legislature, and that the statute giving power to the Commission or the court to declare a rate unreasonable was not to be read as meaning that the declaration of invalidity should apply to intermediate or completed transactions, i. e., should not authorize retroactive changes in rates. The effect of the revised interpretation of the Montana statute announced by the Montana Supreme Court in this case as the principle to be applied with respect to future transactions, is identical with the interpretation placed upon the Federal statute by the United States Supreme Court in the case of Arizona Grocery Co. v. Atchison, Topeka and Santa Fe Railroad Company, 284 U. S. 370. Both of these courts have now in effect held that when an administrative agency declares a certain rate to be a reasonable rate it speaks as the legislature and its pronouncement has the force of statute, and such administrative body can not by a later amendment of its regulations declare its own finding to be erroneous, and subject a carrier which conformed thereto to reparation measured by its later declaration.

Laurence Graves, Southern Bldg., Washington, D. C.
Arthur M. Kracke, Rookery Bldg., Chicago, Ill.

[fol. 97] Certificate of Counsel

The undersigned counsel for petitioners hereby certify that in their judgment the foregoing petition is well founded and is not interposed for delay.

Laurence Graves, Arthur M. Kracke.

[fol. 98] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

MANHATTAN GENERAL EQUIPMENT COMPANY, Petitioner,

against

COMMISSIONER OF INTERNAL REVENUE, Respondent

COLLIER SERVICE CORPORATION, Formerly SUBWAY ADVERTISTISING CO., INC., Petitioner,

against

COMMISSIONER OF INTERNAL REVENUE, Respondent

Before Manton, Augustus N. Hand and Chase, Circuit Judges

Laurence Graves, Esq., Arthur M. Krack, Esq., Counsel for Petitioners.

Per CURIAM:

Petition for rehearing denied.

—— ——, United States Circuit Judges.

Filed May 22, 1935.

[fol. 99] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a stated term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the Court Rooms in the Post Office Building in the City of New York, on the 22nd day of May, one thousand nine hundred and thirty-five.

Present: Hon. Martin T. Manton, Hon. Augustus N. Hand, Hon. Harrie B. Chase, Circuit Judges.

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MANHATTAN GENERAL EQUIPMENT COMPANY, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent

COLLIER SERVICE CORPORATION, Formerly SUBWAY ADVERTISING CO., INC.,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent

A petition for a rehearing having been filed herein by counsel for the petitioners;

Upon consideration thereof it is

Ordered that said petition be and hereby is denied.

Wm. Parkin, Clerk.

[fol. 100] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. Manhattan General Equipment Company v. Commissioner of Internal Revenue. Collier Service Corporation v. Commissioner of Internal Revenue. Order. United States Circuit Court of Appeals, Second Circuit. Filed May 22, 1935. William Parkin, Clerk.

[fol. 101] UNITED STATES OF AMERICA,
Southern District of New York:

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 100, inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of Manhattan General Equipment Company, Petitioner, against Commissioner of Internal Revenue, Respondent, as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this first day of July, in the year of our Lord one thousand nine hundred and thirty-five, and of the Independence of the said United States the one hundred and fifty-ninth.

Wm. Parkin, Clerk. (Seal United States Circuit Court of Appeals, Second Circuit.)

[fol. 96] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 14, 1935

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.